No. 18-431	
Title:	**United States, Petitioner** v. **Maurice Lamont Davis and Andre Levon Glover**
Docketed:	October 3, 2018
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Numbers:	(16-10330)
Decision Date:	September 7, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Oct 03 2018	Petition for a writ of certiorari filed. (Response due November 2, 2018) **Petition** **Certificate of Word Count**
Oct 16 2018	Letter of October 16, 2018 from the Solicitor General filed. **Main Document**
Oct 22 2018	Motion to extend the time to file a response from November 2, 2018 to December 3, 2018, submitted to The Clerk. **Main Document** **Proof of Service**
Oct 25 2018	Motion to extend the time to file a response is granted and the time is extended to and including December 3, 2018.
Nov 01 2018	Motion to extend the time to file a response from November 2, 2018 to December 3, 2018, submitted to The Clerk. **Main Document** **Proof of Service**
Nov 05 2018	Motion to extend the time to file a response is granted and the time is extended to and including December 3, 2018.
Nov 30 2018	Brief of respondent Andre Levon Glover in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 30 2018	Motion for leave to proceed in forma pauperis filed by respondent Andre Levon Glover. **Main Document**
Nov 30 2018	Brief of respondent Maurice Lamont Davis in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Dec 03 2018	Motion for leave to proceed in forma pauperis filed by respondent Maurice Lamont Davis. **Main Document**
Dec 19 2018	DISTRIBUTED for Conference of 1/4/2019.
Dec 19 2018	Reply of petitioner United States filed. (Distributed) **Proof of Service** **Main Document**
Jan 04 2019	Motion for leave to proceed in forma pauperis filed by respondent Maurice Lamont Davis GRANTED.
Jan 04 2019	Motion for leave to proceed in forma pauperis filed by respondent Andre Levon Glover GRANTED.
Jan 04 2019	Petition GRANTED.
Jan 29 2019	Motion to dispense with printing the joint appendix filed by petitioner United States. **Proof of Service** **Main Document**
Feb 11 2019	SET FOR ARGUMENT on Wednesday, April 17, 2019
Feb 12 2019	Brief of petitioner United States filed. **Proof of Service** **Main Document**
Feb 19 2019	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Mar 14 2019	Brief of Maurice Lamont Davis, et al. not accepted for filing. (Corrected brief submitted.) (March 18, 2019)
Mar 14 2019	Brief of respondents Maurice Lamont Davis, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 20 2019	CIRCULATED
Mar 21 2019	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 21 2019	Record requested from the U.S.C.A. 5th Circuit.
Mar 21 2019	Brief amicus curiae of FAMM filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

Mar 21 2019	Brief amicus curiae of National Association of Federal Defenders filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Apr 05 2019	Reply of petitioner United States filed. (Distributed) **Certificate of Word Count** **Main Document**
Apr 05 2019	Motion to appoint counsel filed by respondent Andre Levon Glover. **Main Document** **Proof of Service**
Apr 17 2019	Argued. For petitioner: Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Brandon E. Beck, Assistant Federal Public Defender, Lubbock, Tex.
Apr 17 2019	Motion DISTRIBUTED for Conference of 5/9/2019.
May 13 2019	Motion to appoint counsel GRANTED, and J. Joseph Mongaras, Esq., of Dallas, Texas, is appointed to serve as counsel for respondent Andre L. Glover.
Jun 24 2019	Adjudged to be AFFIRMED IN PART, VACATED IN PART, and case REMANDED. Gorsuch, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Kavanaugh, J., filed a dissenting opinion, in which Thomas and Alito, JJ., joined, and in which Roberts, C. J., joined as to all but Part II–C.

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the subsection-specific definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using, or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally vague.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is not yet reported in the Federal Reporter but is available at 2018 WL 4268432. A prior opinion of the court of appeals (App., *infra*, 10a-17a) is not published in the Federal Reporter but is reprinted at 677 Fed. Appx. 933.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924 provides in pertinent part:

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

* * * * *

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Other pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. See App., *infra*, 24a-31a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, respondents Maurice Davis and Andre Glover were each convicted on one count of conspiracy to commit robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a); multiple counts of robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a) and 2; and two counts of brandishing a short-barreled shotgun during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(B)(i) and 2. Glover Judgment 1; Davis Am. Judgment 1. The district court sentenced Glover to 498 months of imprisonment, to be followed by two years of supervised release, and it sentenced Davis to 608 months of imprisonment, to be followed by two years of supervised release. Glover Judgment 2; Davis Am. Judgment 2. The court of appeals affirmed. App., *infra*, 1a-11a. This Court granted respondents' petitions for writs of certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). On remand, the court of appeals vacated one Section 924(c) conviction as to each respondent and remanded the case to the district court. App., *infra*, 6a.

1. Respondents were involved in a weeklong string of gunpoint robberies of four convenience stores in and around Dallas, Texas. See Gov't C.A. Br. 2-10 (summarizing trial evidence); Gov't Second Supp. C.A. Letter Br. 24-25 (same). Each robbery followed a similar pattern: two people would arrive in a gold SUV with no license plates; one would point a short-barreled shotgun at an employee and issue orders; and the robbers would take cigarettes and, in one case, money. See Gov't C.A. Br. 2-10; Gov't Second Supp. C.A. Letter Br. 24-25.

The first robbery, for example, occurred at 3 a.m. on June 16, 2014, at a convenience store outside Dallas. 11/18/15 Tr. 81-89. After arriving in the SUV, one of the robbers grabbed the only on-duty employee from behind, put a short-barreled shotgun to her side, and asked if she had a "money bag." *Id.* at 82, 88-90. When she explained that she could not open the store's safe, the robber ordered her to take him to a storage room and forced her to lie face down on the floor there. *Id.* at 90-93. The employee "was doing a lot of crying," and the robber told her that "he was going to hurt [her] if [she] didn't be quiet." *Id.* at 93. The second robber then entered the storage room, and both robbers began filling bags with cartons of cigarettes. *Id.* at 92-94, 96. When they were done, one of the robbers told the employee to wait 30 seconds before calling the police or he would kill her. *Id.* at 98.

Soon after the fourth robbery (on June 22, 2014), law enforcement agencies broadcast a lookout describing the robbers and their gold SUV. 11/17/15 Tr. 179-183. Officers spotted respondents, who matched the robbers' descriptions, in a gold SUV, which the officers attempted to stop at a McDonald's drive-through. *Id.* at 182-185. When an officer, with his weapon drawn, ordered them

to show their hands, respondents fled. *Id.* at 185. A chase ensued, with speeds reaching 85 to 95 miles per hour in "[e]xtremely dangerous and wet" conditions. *Id.* at 219; see *id.* at 187-188. After about two miles, respondents crashed the SUV into a concrete ditch and fled on foot, leaving behind a trail of cash. *Id.* at 188-191.

Officers quickly caught Glover, 11/17/15 Tr. 194-196, and later discovered Davis hiding in bushes and sitting atop a pile of cash, *id.* at 196-197. Inside the SUV, officers found numerous cartons of cigarettes, a short-barreled shotgun, a bank deposit bag from the safe of one of the stores that had been robbed, and articles of clothing that matched items worn by the individuals who carried out the robberies. See 11/18/15 Tr. 7, 12-15, 21-25. Davis later admitted his involvement in two of the robberies and stated that he had committed them with another person. *Id.* at 69-72.

2. A grand jury in the Northern District of Texas indicted respondents on one count of conspiracy to commit robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a); two counts of using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(B)(i) and 2; and three counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2. Indictment 1-6, 8-10. Glover was also charged with an additional count of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2, and Davis was charged with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 7, 11.

Section 924(c) makes it a crime to "use[] or carr[y]" a firearm "during and in relation to," or to "possess[]" a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). The statute contains its own specific definition of "crime

of violence," which is applicable only "[f]or purposes of this subsection," 18 U.S.C. 924(c)(3), and which has two subparagraphs, (A) and (B). Section 924(c)(3)(A) specifies that the term "crime of violence" includes any "offense that is a felony" and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Section 924(c)(3)(B) specifies that the term "crime of violence" also includes any "offense that is a felony * * * that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B).

Before trial, respondents moved to dismiss the Section 924(c) counts. They argued that the crimes of violence identified in those counts—Hobbs Act robbery and conspiracy to commit Hobbs Act robbery, Indictment 5, 10—did not qualify as crimes of violence under Section 924(c)(3)(A) and that Section 924(c)(3)(B) is unconstitutionally vague in light of this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Court invalidated on vagueness grounds the residual clause in the sentence-enhancement provisions of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), which classifies an offense underlying a prior conviction as a "violent felony" if that prior offense "otherwise involves conduct that presents a serious potential risk of physical injury to another." The district court denied respondents' motion. App., *infra*, 19a, 22a.

The jury found Glover guilty on all counts and Davis guilty on all counts except one Hobbs Act robbery count. D. Ct. Doc. 83, at 1-3 (Nov. 19, 2015). For the Section 924(c) charges, the jury made special findings that respondents brandished a short-barreled shotgun

during each crime of violence. *Id.* at 2-3; see 18 U.S.C. 924(c)(1)(A)(ii) and (B)(i) (enhanced penalties for brandishing and possession of a short-barreled shotgun). The district court sentenced Glover to concurrent terms of 78 months of imprisonment on the Hobbs Act counts, a consecutive term of 120 months on the first Section 924(c) count, and a consecutive term of 300 months on the second Section 924(c) count, for a total term of 498 months of imprisonment. Glover Judgment 2; see 18 U.S.C. 924(c)(1)(C)(i) (enhanced sentence for "second or subsequent" Section 924(c) conviction); *Deal* v. *United States*, 508 U.S. 129, 132-137 (1993). The court sentenced Davis to concurrent terms of 188 months of imprisonment on the Hobbs Act counts, a concurrent term of 180 months on the felon-in-possession count, a consecutive term of 120 months on the first Section 924(c) count, and a consecutive term of 300 months on the second Section 924(c) count, for a total term of 608 months of imprisonment. Davis Am. Judgment 2.

3. The court of appeals affirmed. App., *infra*, 10a-17a. As relevant here, the court rejected respondents' renewed constitutional challenge to their Section 924(c) convictions. *Id.* at 12a-14a. It relied on a recent en banc decision that had held that the definition of "crime of violence" in 18 U.S.C. 16(b), which is linguistically nearly identical to Section 924(c)(3)(B), was "not unconstitutionally vague in light of *Johnson*" because of textual differences between Section 16(b) and the ACCA's residual clause. App., *infra*, 13a (citing *United States* v. *Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), vacated, 138 S. Ct. 2668 (2018)).

The court of appeals also rejected Glover's alternative contention that "the jury should decide what constitutes a crime of violence." App., *infra*, 14a n.4; see Glover

C.A. Br. 18, 25-26. The Court observed that circuit precedent identified a crime-of-violence determination as "a question of law reserved for the judge." App., *infra*, 14a n.4 (citing *United States* v. *Credit*, 95 F.3d 362, 364 (5th Cir. 1996), cert. denied, 519 U.S. 1138 (1997)). The government's appellate brief, in addition to noting that the construction was foreclosed by circuit precedent, had also explained that any failure to submit the determination to the jury in this case had been harmless, because "the evidence was overwhelming" that respondents' crimes were "committed * * * in a way that involved the use or threatened use of force or posed a substantial risk that force would be used." Gov't C.A. Br. 28-29. The government observed, for example, that Glover "thrice put a sawed-off shotgun to a woman—and his accomplice did so once—to demand her submission to his theft of cigarettes." *Id.* at 27.

4. Respondents petitioned for writs of certiorari, seeking review of the question whether the definition of "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague. See App., *infra*, 1a.

While respondents' petitions were pending, this Court decided *Sessions* v. *Dimaya*, *supra*. In *Dimaya*, the Court held unconstitutionally vague the definition of "crime of violence" in 18 U.S.C. 16(b), as incorporated into the removability provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See 138 S. Ct. at 1210, 1213. Section 16(b)—which defines a "crime of violence" to include "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 16(b)—is linguistically nearly identical to Section 924(c)(3)(B). But unlike Section

924(c)(3)(B), and like the ACCA's residual clause, it applies in circumstances that include the classification of prior convictions—as in *Dimaya* itself, where an alien's state conviction had led to federal removal proceedings. See 138 S. Ct. at 1212-1213.

The Court explained that Section 16(b), as incorporated into the INA, suffered from "the same two features," "combined in the same constitutionally problematic way," that had led the Court to find the ACCA's residual clause unconstitutionally vague in *Johnson*. *Dimaya*, 138 S. Ct. at 1213. The first feature was a "categorical approach" to the crime-of-violence inquiry, under which a court would seek "to identify a crime's 'ordinary case'" and to assess whether the crime, in that idealized "ordinary case," poses a substantial risk that physical force will be used. *Id.* at 1215-1216. Second, the statute left "uncertainty about the level of risk that makes a crime 'violent.'" *Id.* at 1215.

The Court emphasized in *Dimaya*, as it had in *Johnson*, that it "'d[id] not doubt' the constitutionality of applying" a "'substantial risk'" standard like Section 16(b)'s "'to real-world conduct,'" rather than "'a judge-imagined abstraction.'" 138 S. Ct. at 1215-1216 (quoting *Johnson*, 135 S. Ct. at 2558, 2561). And the Court did not hold that Section 16(b) "demands a categorical approach." *Id.* at 1216. A plurality of Justices took the view that Section 16(b) was "[b]est read" that way. See *id.* at 1217 (opinion of Kagan, J.). But Justice Gorsuch, in describing "some limits on today's holding," noted that he had only "proceeded on the premise" that the INA, "as it incorporates" Section 16(b), employed a categorical approach. *Id.* at 1232 (Gorsuch, J., concurring in part and concurring in the judgment). He stated that he "remain[ed] open to different arguments" in a future

case, and observed that "no party" had argued against a categorical approach, that precedent "seemingly require[d]" it, and that "the government itself ha[d] conceded (repeatedly) that the law compels it." *Id.* at 1232-1233. In dissent, Justice Thomas, joined by Justices Kennedy and Alito, would have forgone a categorical approach to Section 16(b) in favor of a focus on the underlying, real-world conduct of the alien's prior offense. *Id.* at 1254-1259; see also *id.* at 1234-1242 (Roberts, C.J., dissenting) (not addressing the issue).

The Court subsequently granted respondents' petitions, vacated the judgment of the court of appeals in respondents' case, and remanded to the court of appeals for further consideration in light of *Dimaya*. See 138 S. Ct. 1979, 1979; 138 S. Ct. 1979, 1979-1980.

5. On remand, the government acknowledged that it had previously argued, consistent with circuit precedent, that Section 924(c)(3)(B) requires an ordinary-case categorical approach of the sort ascribed to Section 16(b) in *Dimaya*. Gov't Second Supp. C.A. Letter Br. 6. The government observed, however, that such an interpretation "raise[d] serious constitutional questions" in light of *Dimaya*, and it accordingly urged the court of appeals to avoid those questions by construing Section 924(c)(3)(B) to instead require a "case-specific approach." *Id.* at 6-7 (emphasis omitted). Under that construction, "the classification of an offense as a 'crime of violence' under" Section 924(c)(3)(B) would "be based on the defendant's actual conduct" that gave rise to the Section 924(c) prosecution. *Id.* at 6. It would therefore be an inquiry that "present[ed] a mixed question of law and fact that must either be resolved by a jury or admitted by the defendant in connection with a guilty

plea," *id.* at 6-7, rather than the sort of inquiry that *Dimaya* had identified as one of two factors that jointly required invalidating Section 16(b) as incorporated into the INA.

The court of appeals, however, refused to construe Section 924(c)(3)(B) in a manner that would avoid the constitutional difficulties identified in *Dimaya* and instead struck down Section 924(c)(3)(B) as impermissibly vague. App., *infra*, 5a. It adhered to circuit precedent applying an ordinary-case categorical approach to Section 924(c)(3)(B) and concluded that the provision, so construed, was unconstitutional in light of *Dimaya*. *Id.* at 4a-5a. And, reasoning that conspiracy to commit Hobbs Act robbery could qualify as a crime of violence for Section 924(c) only under the definition in Section 924(c)(3)(B), it vacated the convictions for which that crime was the predicate offense and remanded to the district court with instructions to enter a revised sentence that excised the periods of imprisonment that had been based on those counts. *Id.* at 4a, 6a. Judge Higginbotham authored a separate opinion that concurred in the vacatur of the convictions, but objected to the failure to remand for a full resentencing. *Id.* at 7a-9a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in construing 18 U.S.C. 924(c)(3)(B) in a manner that it deemed unconstitutional under *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). In doing so, it struck down a federal statute of critical importance to the prosecution of violent crime, contributed to a growing circuit disagreement, and threatened the outcomes of a great number of current, future, and even past criminal cases. This Court's prompt intervention is necessary.

A. The Court Of Appeals' Decision Is Wrong

Although the government has previously advocated an ordinary-case categorical approach to the determination whether an offense constitutes a "crime of violence" under Section 924(c)(3)(B), nothing in the statute or the decisions of this Court requires such an approach. Section 924(c)(3)(B)'s subsection-specific "crime of violence" definition is applicable only to the conduct for which the defendant is currently being prosecuted, not to any conduct for which the defendant may have been convicted in the past. It can naturally be read as inviting a case-specific determination as to whether *that* currently at issue conduct—not the hypothetical conduct of an "ordinary case"—satisfies the substantial-risk test in 18 U.S.C. 924(c)(3)(B). And, so construed, Section 924(c)(3)(B) does not implicate the constitutional infirmity with the ordinary-case approach that was identified in *Dimaya* and *Johnson* v. *United States*, 135 S. Ct. 2551, 2561 (2015). Indeed, the Court in those cases "d[id] not doubt" that such a case-specific approach, involving a jury finding beyond a reasonable doubt about the "real-world conduct" proved in the case, would be fully constitutional. *Dimaya*, 138 S. Ct. at 1215 (quoting *Johnson*, 135 S. Ct. at 2561).

1. The statutory language and structure support a case-specific inquiry under Section 924(c)(3)(B)

The text and context of Section 924(c)(3)(B) are, if anything, more strongly indicative of a case-specific approach than a categorical one.

As relevant here, conviction under Section 924(c) requires a jury to find (or the defendant to admit through a plea) that the defendant possessed, carried, or used a firearm; that he "committed all the acts necessary to be subject to punishment for" a crime of violence; and

that the possession, carrying, or use of the firearm was sufficiently connected to those acts. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999).

Where the conduct that constitutes the "crime of violence" is already part of the offense conduct that the government must prove to the jury, it is both natural and practical for the jury also to determine whether that conduct "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B). In the context of a criminal jury trial, an inquiry concerning "the course of committing the offense," *ibid.*, would presumptively be a question for the jury, not the judge. The "course of committing the offense" is the precise subject of the factual findings that a criminal jury is required to make beyond a reasonable doubt. One would not ordinarily suppose that a determination on that subject would instead turn on a "judge-imagined abstraction" of "an idealized ordinary case of the crime," *Dimaya*, 138 S. Ct. at 1216 (citation omitted).

The term "offense," as used in 18 U.S.C. 924(c)(3)(B), is thus most naturally understood to refer not just to the law the defendant has violated, but his particular violation of it. As the Court recognized in *Nijhawan* v. *Holder*, 557 U.S. 29 (2009), "in ordinary speech words such as 'crime,' 'felony,' 'offense,' and the like sometimes refer to a generic crime, say, the crime of fraud or theft in general, and sometimes refer to the specific acts in which an offender engaged on a specific occasion, say, *the* fraud that the defendant planned and executed last month." *Id.* at 33-34. The Court in that case accordingly interpreted a provision that used the term "offense," 8 U.S.C. 1101(a)(43)(M), to "call[] for a 'circumstance-

specific,' not a 'categorical,' interpretation," *Nijhawan*, 557 U.S. at 36. And in *United States* v. *Hayes*, 555 U.S. 415 (2009), the Court similarly interpreted the phrase "an offense * * * committed by a current or former spouse," *id.* at 420 (quoting 18 U.S.C. 921(a)(33)(A)), as contemplating a factual, rather than a categorical, inquiry, see *id.* at 426.

That same case-specific meaning of "offense" would fit even more comfortably in Section 924(c)(3)(B). In the statutes at issue in both *Nijhawan* and *Hayes*, the term was used to refer to a *prior* offense that was relevant to a later proceeding. See *Nijhawan*, 557 U.S. at 32-33; *Hayes*, 555 U.S. at 420. In Section 924(c)(3)(B), by contrast, the term "offense" appears in the definition of the "crime of violence" that the government must prove to the jury that the defendant committed. 18 U.S.C. 924(c)(1)(A) and (3); *Rodriguez-Moreno*, 526 U.S. at 280. An "offense that is a felony," 18 U.S.C. 924(c)(3), can satisfy that definition in one of two alternative ways. See *Nijhawan*, 557 U.S. at 33-34 (recognizing that "felony," like "offense," can have a case-specific meaning). Under Section 924(c)(3)(A), it can be an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), in which case the jury's finding that the defendant committed the offense is in itself enough to establish a "crime of violence." Otherwise, under 18 U.S.C. 924(c)(3)(B), it is a crime of violence only in the event of a further determination that the offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

That further determination is one that a jury would be well-positioned to make (or find not to be supported) on the facts before it. Criminal statutes frequently ask juries to engage in similar real-world risk-based inquiries. As this Court recognized in *Johnson*, "dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk,'" to "gaug[e] the riskiness of conduct in which an individual defendant engages on a particular occasion." 135 S. Ct. at 2561 (emphasis omitted). For example, a typical reckless-endangerment or criminal-recklessness offense is defined as "recklessly engag[ing] in conduct which creates a substantial risk of serious physical injury to another person." N.Y. Penal Law § 120.20 (McKinney 2009); see, *e.g.*, Ala. Code § 13A-6-24(a) (LexisNexis 2015); Alaska Stat. § 11.41.250(a) (2016); Ariz. Rev. Stat. Ann. § 13-1201(A) (2010); Ark. Code Ann. § 5-13-205(a)(1) (2013). Many other offenses in disparate areas of the criminal law—including arson, theft, sexual assault, threats, resisting arrest, vehicular homicide, and kidnapping—use similar risk-based formulations to define the crime or aggravating elements. See, *e.g.*, 21 U.S.C. 858; Conn. Gen. Stat. Ann. § 53a-111(a) (West 2012); Ind. Code Ann. § 35-43-4-2(a) (LexisNexis Supp. 2018); Iowa Code Ann. § 709.3(1) (West 2016); Md. Code Ann., Crim. Law § 3-1001(c) (LexisNexis Supp. 2017); Mass. Ann. Laws ch. 265, § 13L (LexisNexis 2010); Utah Code Ann. § 76-5-301(1)(b) (LexisNexis 2017).

The directive that the determination of risk be based on the "nature" of the offense does not suggest that the inquiry becomes an abstract question of law. "[T]he word 'nature' as used in the phrase 'by its nature' is commonly understood to mean 'the basic or inherent features, character, or qualities of something.'" *United*

States v. *Barrett*, No. 14-2641, 2018 WL 4288566, at *13 (2d Cir. Sept. 10, 2018) (quoting *Oxford Dictionary of English* 1183 (3d ed. 2010)). In Section 924(c)(3)(B), that "something" is the conduct of the defendant in violation of federal law. "It is entirely natural to use words like 'nature' and 'offense' to refer to an offender's actual underlying conduct." *Dimaya*, 138 S. Ct. at 1254 (Thomas, J., dissenting); see *id.* at 1254 n.7 (listing examples). Two violations of the same criminal statute can have very different natures; a conspiracy to commit arson of a rival gang's headquarters, for example, is "by its nature" different from a conspiracy to commit arson of one's own property for insurance money. See 18 U.S.C. 844(n). The focus on the "nature" of the offense, and not just the acts comprising it, would make the first conspiracy a "crime of violence" even if it was largely inchoate at the time of the defendant's arrest. The second conspiracy, to the extent it did not "involve[] a substantial risk" of "physical force against the person or property *of another*," 18 U.S.C. 924(c)(3)(B) (emphasis added), would not be, see 18 U.S.C. 844(i) (criminalizing arson of defendant's own property). But nothing in the text or context of Section 924(c)(3)(B) dictates that those two crimes must be treated the same way, or viewed at an abstract level of generality by a judge, rather than addressed on a case-specific basis by a jury.

2. Nothing requires an interpretation of Section 924(c)(3)(B) that would render it unconstitutional

This Court has never addressed whether Section 924(c)(3)(B) employs a case-specific approach or a categorical one. In the absence of guidance from this Court, the government and the lower courts have generally treated Section 924(c)(3)(B) analogously to similarly

worded provisions in other statutes that have been construed to incorporate a categorical approach. "It is a fundamental canon of statutory construction," however, "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts* v. *Sea-Land Air Servs., Inc.*, 566 U.S. 93, 101 (2012) (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)). And the context of Section 924(c)(3)(B) differs critically from the context of those other provisions. Indeed, in light of *Dimaya*, it is apparent that both the practical and the constitutional concerns that animated the categorical approach as to those provisions counsel in favor of a case-specific approach to Section 924(c)(3)(B).

a. This Court developed the categorical approach in the "singular context" of "*judicial* identification of what crimes (most often, state crimes) of *prior* conviction fit federal definitions of violent crimes so as to expose a defendant to enhanced penalties or other adverse consequences in *subsequent* federal proceedings." *Barrett*, 2018 WL 4288566, at *12. The "categorical approach" has two somewhat different forms, with the "ordinary case" approach at issue here representing an offshoot of the original version.

Under the original version of the categorical approach, which is "used to determine whether a prior conviction is for a particular listed offense (say, murder or arson)," "courts ask what the elements of a given crime always require—in effect, what is legally necessary for a conviction." *Dimaya*, 138 S. Ct. 1211 n.1; see *Taylor* v. *United States* 495 U.S. 575, 602 (1990). The Court subsequently adopted a modified form, used to analyze prior convictions under the ACCA's residual clause and 18 U.S.C. 16(b), which "requires a court to

ask whether 'the ordinary case' of an offense" satisfies a particular qualitative description. *Dimaya*, 138 S. Ct. at 1211 (quoting *James* v. *United States*, 550 U.S. 192, 208 (2007)).

b. As a practical matter, the Court recognized that a categorical approach, as applied to prior convictions, would avoid "the relitigation of past convictions in mini-trials conducted long after the fact." *Moncrieffe* v. *Holder*, 569 U.S. 184, 200-201 (2013); see also *Shepard* v. *United States*, 544 U.S. 13, 20 (2005) (describing the categorical approach as a "pragmatic" way to "avoid[] subsequent evidentiary enquiries"). The Court explained that in the absence of such an approach, a sentencing court would face the "daunting" practical difficulty of attempting to determine—potentially many years later—how a defendant's prior offense actually occurred. *Taylor*, 495 U.S. at 601. Prior convictions "that are counted for an ACCA enhancement are often adjudicated by different courts in proceedings that occurred long before the defendant's sentencing." *United States* v. *Robinson*, 844 F.3d 137, 142 (3d Cir. 2016), cert. denied, 138 S. Ct. 215 (2017). The same is true for many statutes that incorporate Section 16(b) in the context of classifying prior convictions, including the immigration statute at issue in *Dimaya*. See 138 S. Ct. at 1218 (opinion of Kagan, J.) (discussing the "utter impracticability" of a fact-based approach to classifying prior convictions under Section 16(b)) (quoting *Johnson*, 135 S. Ct. at 2562).

Not only is that practical concern nonexistent in the Section 924(c)(3)(B) context, but practical considerations in fact favor a case-specific approach. The application of Section 924(c)(3)(B) does not depend on a historical conviction, but rather on "a crime of *pending*

prosecution." *Barrett*, 2018 WL 4288566, at *12. A Section 924(c) prosecution necessarily involves a "developed factual record" about the underlying crime. *United States* v. *St. Hubert*, 883 F.3d 1319, 1335 (11th Cir.), petition for cert. pending, No. 18-5269 (filed July 13, 2018). Given the availability of a "record of all necessary facts," *Robinson*, 844 F.3d at 141, it is actually much *easier* for the jury to conduct a case-specific inquiry based on those "real-world facts" than it would be for a judge "to 'imagine' an 'idealized ordinary case of the crime,'" *Dimaya*, 138 S. Ct. at 1213-1214 (quoting *Johnson*, 135 S. Ct. at 2557).

c. From a constitutional perspective, "this Court adopted the categorical approach in part to 'avoid the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries.'" *Dimaya*, 138 S. Ct. at 1217 (opinion of Kagan, J.) (quoting *Descamps* v. *United States*, 570 U.S. 254, 267 (2013)) (brackets omitted). For example, a plurality of the Court in *Shepard* v. *United States*, *supra*, suggested that a judge's resolution of the disputed facts underlying a defendant's prior conviction at sentencing would be "too much like" the kind of factfinding that the Sixth Amendment requires the jury to conduct. 544 U.S. at 25 (opinion of Souter, J.). The *Shepard* plurality thus indicated that, in the context of the ACCA's residual clause, which increases the statutory sentencing range for certain federal firearm crimes if the defendant has a sufficient number of qualifying prior convictions, the categorical approach is supported by the "rule of reading statutes to avoid serious risks of unconstitutionality." *Ibid.* A plurality of the Court in *Dimaya* raised a similar concern in the context of Section 16(b), which likewise has "criminal sentencing consequences" in

some of its applications. 138 S. Ct. at 1217 (opinion of Kagan, J.).

Transposing that concern to the context of Section 924(c)(3)(B), however, would turn the principle of constitutional avoidance on its head. A case-specific approach to Section 924(c)(3)(B) could not invite any Sixth Amendment concerns; it would result in more jury findings, not fewer. But it *would* invite the vagueness concerns that led to the constitutional invalidation of the ACCA's residual clause and Section 16(b) in *Johnson* and *Dimaya*. See *Dimaya*, 138 S. Ct. at 1215; *Johnson*, 135 S. Ct. at 2557-2558. As those decisions explain—in contrast to a provision that applies a "'substantial risk'" standard "'to real-world conduct'"—a provision that "'requires a court to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents' some not-well-specified-yet-sufficiently-large degree of risk * * * produces * * * 'more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Dimaya*, 138 S. Ct. at 1215-1216 (quoting *Johnson*, 135 S. Ct. at 2557-2558, 2561). An interpretation of Section 924(c)(3)(B) that steers straight into the teeth of *Johnson* and *Dimaya* cannot be reconciled with courts' "obligat[ion] to construe [a] statute to *avoid* [constitutional] problems" if it is "'fairly possible'" to do so. *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001) (emphasis added); see, *e.g.*, *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018) (explaining canon).

d. In the absence of the ordinary-case categorical approach to the ACCA and Section 16(b), it is highly unlikely that anyone would have invented or applied it in the context of Section 924(c)(3)(B). Before *Johnson* and *Dimaya*, it made sense to treat the textual similarities of the three statutes as an indication that all three

should employ that same approach. But any presumption to that effect disappeared once this Court identified the approach as a fatal defect in the other provisions. Given a viable alternative, which Section 924(c)(3)(B)'s text and context plainly offer, courts should construe Section 924(c)(3)(B) to avoid vagueness concerns—not introduce them. See *United States ex rel. Att'y Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909) (explaining courts' "plain duty" to adopt any "reasonabl[e]" interpretation of a statute that avoids constitutional concerns, rather than holding the statute unconstitutionally vague).

B. The Question Presented Warrants This Court's Review

This Court should grant review expeditiously to itself address whether *Johnson* and *Dimaya* in fact require the constitutional invalidation of Section 924(c)(3)(B). That issue has generated circuit disagreement, caused widespread confusion and litigation in the lower courts, and impeded the enforcement of a federal statute that is critically important to controlling violent crime.

1. This Court often grants certiorari "in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional," even in the absence of a circuit conflict. *United States* v. *Kebodeaux*, 570 U.S. 387, 391 (2013); see also, *e.g.*, *Matal* v. *Tam*, 137 S. Ct. 1744 (2017); *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076 (2015); *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225 (2015); *United States* v. *Alvarez*, 567 U.S. 709 (2012); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010); *United States* v. *Comstock*, 560 U.S. 126 (2010); *United States* v. *Stevens*, 559 U.S. 460 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008). That practice is consistent with the Court's recognition that judging the constitutionality of a federal statute is "the gravest and

most delicate duty that th[e] Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)).

Here, an acknowledged post-*Dimaya* circuit disagreement already exists. Like the Fifth Circuit, the Tenth and D.C. Circuits have held that Section 924(c)(3)(B) is unconstitutionally vague in light of *Dimaya*. See *United States* v. *Salas*, 889 F.3d 681, 684-686 (10th Cir.), petition for cert. pending (filed Oct. 3, 2018); *United States* v. *Eshetu*, 898 F.3d 36, 37-38 (D.C. Cir.) (per curiam), petition for reh'g pending, No. 15-3020 (D.C. Cir. filed Aug. 31, 2018). Those decisions include little analysis, instead relying on circuit precedent holding that Section 924(c)(3)(B) requires an ordinary-case approach and the nearly identical wording of Sections 16(b) and 924(c)(3)(B). See App., *infra*, 5a; *Salas*, 889 F.3d at 686; *Eshetu*, 898 F.3d at 37.

In contrast, the Second Circuit in *Barrett* expressly disagreed with other circuits and determined that Section 924(c)(3)(B) is not unconstitutionally vague because it "can be applied to a defendant's case-specific conduct, with a jury making the requisite findings about the nature of the predicate offense and the attending risk of physical force being used in its commission." 2018 WL 4288566, at *9; see *id.* at *8 n.8. The Second Circuit observed that neither the Tenth nor D.C. Circuits had "address[ed] whether continued reliance on an ordinary-case standard makes sense for a predicate offense of a pending § 924(c)(1)(A) crime, or whether the canon of constitutional avoidance mandates a different interpretation of the statute." *Id.* at *8 n.8. And the Second Circuit recognized that a case-specific approach is a reasonable construction of Section 924(c)(3)(B) that

"avoids not only the constitutional vagueness concerns that *Dimaya* * * * located in the categorical ordinary-case standard, but also the Sixth Amendment right-to-trial concern that originally prompted the Supreme Court to mandate a categorical approach to residual definitions of crimes of violence." *Id.* at *10; see also *id.* at *10-*12 (reviewing this Court's categorical-approach decisions and concluding that "the mandate for a categorical approach" does not apply to Section 924(c)(3)(B), which "defines a predicate offense for a crime of *pending* prosecution").

The uncertainty in the lower courts is not limited to those decisions. Even before *Dimaya*, a number of other courts had suggested abandoning the categorical approach to Section 924(c)(3)(B), without yet taking that step. See, *e.g.*, *St. Hubert*, 883 F.3d at 1334-1337; *In re Irby*, 858 F.3d 231, 234 (4th Cir. 2017); *Robinson*, 844 F.3d at 141; *United States* v. *Prickett*, 830 F.3d 760, 761 (8th Cir.) (per curiam), vacated, 839 F.3d 697 (8th Cir. 2016) (per curiam), cert. denied, 138 S. Ct. 1976 (2018); *Shuti* v. *Lynch*, 828 F.3d 440, 449-450 (6th Cir. 2016), cert. denied, 138 S. Ct. 1977 (2018). And after *Dimaya*, two courts of appeals have *sua sponte* ordered en banc review to reconsider whether Section 924(c)(3)(B) requires a categorical approach. *United States* v. *Simms*, No. 15-4640 (4th Cir. argued Sept. 26, 2018); *Ovalles* v. *United States*, No. 17-10172 (11th Cir. argued July 9, 2018). A petition for en banc review is also pending in the D.C. Circuit. *United States* v. *Eshetu*, No. 15-3020 (filed Aug. 31, 2018).

2. The widespread post-*Dimaya* disruption warrants this Court's immediate attention. Further percolation will just increase the confusion; the circuits are unlikely to reach uniformity on their own. And because the Tenth

Circuit has denied en banc review, Section 924(c)(3)(B) will now irrevocably be unenforceable in at least one part of the country unless and until this Court intervenes.

The invalidation of Section 924(c)(3)(B) is a massive blow to federal law-enforcement interests. In 2017 alone, more than 2700 defendants were charged with a Section 924(c) violation. U.S. Courts, *Table D-2—U.S. District Courts–Criminal Statistical Tables For The Federal Judiciary* (Dec. 31, 2017), http://www.uscourts.gov/statistics/table/d-2/statistical-tables-federal-judiciary/2017/12/31. The decision below would effectively immunize from Section 924(c) prosecution many defendants who commit offenses that do not technically fit the elements clause of the definition of "crime of violence," 18 U.S.C. 924(c)(3)(A), but that are undoubtedly violent, in the sense of involving by their nature a "substantial risk that physical force" may be used, 18 U.S.C. 924(c)(3)(B).

As the facts of this case vividly illustrate, that result would render Section 924(c) inapplicable to some of the most violent criminals on the federal docket. Conspiracy to commit the sort of violent robbery spree at issue here—involving gunpoint threats against store employees—indisputably "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B); see pp. 4-5, *supra* (detailing respondents' crimes); see also, *e.g.*, *United States* v. *Eshetu*, 863 F.3d 946, 949-950, 956 (D.C. Cir. 2017) (conspiracy to commit Hobbs Act robbery in which the defendants planned to rob a liquor store using knives, guns), vacated in part, 898 F.3d 36 (D.C. Cir.), petition for reh'g pending, No. 15-3020 (D.C. Cir. filed Aug. 31, 2018). Other offenses that have been excluded include arson committed through firebombing, see *Salas*,

889 F.3d at 683, 687-688, and a kidnapping in which the victim was beaten, doused with gasoline, and had a firework placed in his mouth, *United States* v. *Jenkins*, 849 F.3d 390, 393-394 (7th Cir. 2017), vacated, 138 S. Ct. 1980 (2018); see Gov't C.A. Br. at 5-6, *Jenkins*, *supra* (No. 14-2898).

The problems are not limited to current and future prosecutions, but extend to past ones as well. Defendants whose convictions long ago became final are mounting collateral attacks to their convictions and sentences. See, *e.g.*, *Velleff* v. *United States*, 307 F. Supp. 3d 891, 892-896 (N.D. Ill.), appeal pending, No. 18-2308 (7th Cir. filed June 14, 2018). Decisions that call into question the validity of Section 924(c)(3)(B) thus undermine "the strong societal interest in finality," *Lee* v. *United States*, 137 S. Ct. 1958, 1967 (2017), by proliferating collateral attacks, creating litigation burdens, and potentially allowing violent criminals back on the street. This Court should expeditiously address whether that result is in fact required.

3. This case is a particularly good vehicle for addressing the question presented. It comes to the Court on a direct appeal and thus does not present any of the complications that might arise in a collateral-review posture. The court of appeals directly addressed and rejected the cases-specific approach advanced by the government, without suggesting that it had been forfeited or waived.

The question presented is also almost certainly outcome-determinative here. Construing Section 924(c)(3)(B) to incorporate a case-specific approach would not only preserve the statute's constitutionality, but should also preserve the convictions that the court of appeals vacated. The district court did not instruct the jury using

a case-specific approach, but the record allows for no reasonable doubt that a properly instructed jury would have found that respondents' conduct involved a substantial risk of physical force to person or property, thereby rendering any instructional error harmless. See *Neder* v. *United States*, 527 U.S. 1, 8-13 (1999). Indeed, the government made that very point in response to Glover's argument on appeal that a case-specific approach should be applied, and the government reasserted that view in its supplemental brief advocating for a case-specific approach. See pp. 8, 10-11, *supra*.

4. Simultaneously with the filing of this petition, the United States is also filing a petition for a writ of certiorari to review the judgment of the Tenth Circuit in *United States* v. *Salas*, *supra*. As explained in that petition, although *Salas* would otherwise be a suitable vehicle for reviewing the question presented, it may not be possible for that case to be heard by the full Court. Pet. at 7-8, *United States* v. *Salas* (filed Oct. 3, 2018). The government has expedited this petition in order to provide the Court with a good alternative vehicle that would allow the question presented to be briefed and argued this Term. In light of the paramount importance of that question, and the inability of any other court to resolve it definitively, the Court should grant certiorari in this case to address it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-10330

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MAURICE LAMONT DAVIS; ANDRE LEVON GLOVER,
DEFENDANTS-APPELLANTS

Filed: Sept. 7, 2018

Appeals from the United States District Court
for the Northern District of Texas

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before: HIGGINBOTHAM, JONES, and HAYNES, Circuit Judges.

PER CURIAM:

On January 31, 2017, we issued an opinion in this case denying Andre Levon Glover's challenge to his conviction and sentence and Maurice Lamont Davis's (Davis and Glover, collectively, "Defendants") challenge to his sentence, affirming the district court's entry of judgment from the charges under 18 U.S.C. § 1951 and 18 U.S.C. § 924(c). *United States v. Davis*, 677 F. App'x 933, 935-36 (5th Cir. 2017) (per curiam). Defendants petitioned the Supreme Court for certiorari. Follow-

ing its decision in *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204 (2018), the Court remanded this case to our court "for further consideration" in light of *Dimaya*. *Davis v. United States*, 138 S. Ct. 1979, 1979-80 (2018). We requested supplemental briefing from the parties on the effect of the Court's decision and now (1) continue to affirm Defendants' conviction under Count Seven; (2) vacate Defendants' conviction under Count Two; and (3) leave the remainder of our prior opinion intact.[1]

The first question is whether *Dimaya* affects Defendants' convictions on Count Seven for illegally using or carrying a firearm in relation to a crime of violence, that is, Hobbs Act robbery. *See* 18 U.S.C. § 924(c). The conviction depends on whether Hobbs Act robbery is a "crime of violence" subsumed by § 924(c)(3)(a). Defendants urge us to extend *Dimaya* to reconsider our precedent on this question. In *United States v. Buck*, we held that "[i]t was not error—plain or otherwise —"to classify Hobbs Act robbery as a crime of violence under the § 924(c) elements clause, citing cases in the

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[1] Specifically, Davis individually argues that his ACCA sentencing enhancement based upon multiple burglary convictions under Texas Penal Code § 30.02 cannot stand in light of *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc), *petitions for cert. filed*, (U.S. Apr. 18, 2018) (No. 17-1445), *and* (U.S. May 21, 2018) (No. 17-9127). He notes that his case is still on direct appeal, and therefore, he is entitled to the benefit of *Herrold*. *See Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987). However, addressing that issue would exceed the scope of the Supreme Court remand, and therefore, we decline to do so at this time. *See Aladdin's Castle, Inc. v. City of Mesquite*, 713 F.2d 137, 138-39 (5th Cir. 1983). To be clear, we thus are not addressing *Herrold* on remand nor are we directing the district court to do so.

Second, Third, Eighth, Ninth, and Eleventh Circuits. 847 F.3d 267, 274-75 (5th Cir.), *cert. denied*, 138 S. Ct. 149 (2017). Nonetheless, Defendants argue that Hobbs Act robbery can be committed without the use, attempted use, or threatened use of physical force, because "fear of injury" is included in the definition of robbery. *See* 18 U.S.C. § 1951(b)(1).

We decline to extend *Dimaya*'s holding that far. Section 924(c) contains both an elements clause and a residual clause; the elements clause defines an offense as a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," whereas the residual clause defines an offense as a crime of violence if it, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *See* § 924(c)(3). *Dimaya* only addressed, and invalidated, a residual clause mirroring the residual clause in § 924(c); it did not address the elements clause. Whatever arguments may be made opposing Hobbs Act robbery's inclusion under the elements clause as a crime of violence, *Dimaya* has not affected them, and therefore, they are foreclosed to us in light of *Buck*. Thus, we affirm our prior judgment regarding Davis and Glover's convictions for violations of § 924(c) as predicated on Hobbs Act robbery.

Defendants' firearms convictions for knowingly using, carrying, or brandishing a firearm to aid and abet conspiracy to interfere with commerce by robbery under Count Two present a less clear question. We have held that conspiracy to commit an offense is merely an agreement to commit an offense. *United States*

v. Gore, 636 F.3d 728, 731 (5th Cir. 2011). Therefore, here, the conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force. Accordingly, the Government concedes that Defendants could only have been convicted as to Count Two under the residual clause.

The Government attempts to change its prior approach to these cases on remand by abandoning its longstanding position that 18 U.S.C. § 924(c)(3)(B) should be analyzed under the categorical approach. In light of *Dimaya*, the Government argues we can, and should, adopt a new "case specific" method when applying the residual clause; this method would compare § 924(c)'s residual definition to the "defendant's actual conduct" in the predicate offense. Regardless of whether *Dimaya* would otherwise permit us to do so, we do not find a suggestion by a minority of justices in that case sufficient to overrule our prior precedent.[2] *See United States v. Williams*, 343 F.3d 423, 431 (5th Cir. 2003) ("We use the so-called categorical approach when ap-

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[2] Justice Gorsuch, in concurrence, along with Justice Thomas, joined by Justices Kennedy and Alito, in dissent, suggested that an alternative approach to the categorical approach may be preferable in analyzing residual clauses. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring in part and concurring in the judgment); *id.* at 1252-53 (Thomas, J., dissenting). However, the holding in *Dimaya* addressed § 16(b) as interpreted via the categorical approach, without deciding whether the statute could be interpreted under alternative approaches. *See id.* at 1217-18 (plurality opinion) (interpreting the categorical approach as the "best read[ing]" of the statutory text); *id.* at 1233 (Gorsuch, J., concurring in part and concurring in the judgment) (noting that other interpretive approaches may be possible, but that the parties conceded application of the categorical approach in this case).

plying [§ 924(c)(3)(B)] to the predicate offense statute. 'The proper inquiry is whether a particular defined offense, in the abstract, is a crime of violence.'" (quoting *United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir. 2001))). Therefore, we must address the serious constitutional questions apparent in the residual clause of § 924(c)(3)(B) in light of *Dimaya*.

The Supreme Court rested its decision in *Dimaya* on its concerns about the language of the statute itself. Although § 16(b) contained linguistic differences to the Armed Career Criminal Act ("ACCA") residual clause the Court had previously invalidated in *Johnson v. United States*, 135 S. Ct. 2551 (2015), it noted that each statute contained "both an ordinary-case requirement and an ill-defined risk threshold," and this "'devolv[ed] into guesswork and intuition,' invited arbitrary enforcement, and failed to provide fair notice." *Dimaya*, 138 S. Ct. at 1223 (alteration in original) (quoting *Johnson*, 135 S. Ct. at 2559). Because the language of the residual clause here and that in § 16(b) are identical, this court lacks the authority to say that, under the categorical approach, the outcome would not be the same. We hold that § 924(c)'s residual clause is unconstitutionally vague. Therefore, Defendants' convictions and sentences under Count Two must be vacated.[3] We conclude this decision does not implicate

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[3] Davis received a 120-month sentence as to Count Two, to run consecutively with a concurrent 188-month sentence as to Counts One, Five, and Six and a 300-month sentence as to Count Seven, along with a concurrent 120-month sentence as to Count Eight, for an aggregate sentence of 608 months. Glover also received a 120-month sentence as to Count Two, to run consecutively with a concurrent seventy-eight-month sentence as to Counts One, Three,

the sentences on the other counts. *U.S. v. Clark*, 816 F.3d 350, 360 (5th Cir. 2016).

Accordingly, we **AFFIRM** the judgment of the district court except with respect to the conviction and sentence as to Count Two; as to Count Two, we **VACATE** the conviction and **REMAND** for entry of a revised judgment consistent herewith.

Four, Five, and Six and a 300-month sentence as to Count Seven, for an aggregate sentence of 498 months.

PATRICK E. HIGGINBOTHAM, Circuit Judge, concurring in part and dissenting in part:

I concur only in the vacating of the Count Two conviction. With respect, the remedy afforded Davis is deeply flawed by two basic errors of law interlaced in effect.

First, in the majority's suggestion that we are here barred from considering issues beyond the scope of the Supreme Court's remand order. *Supra* at 2 n.1. After granting certiorari in this case, the Court vacated our previous opinion and remanded for consideration in light of the *Dimaya* decision. *Davis v. United States*, 138 S. Ct. 1979 (2018). In this circumstance we have jurisdiction to consider issues not addressed in the Supreme Court's mandate on remand. *Hill v. Black*, 920 F.2d 249, 250 (5th Cir. 1990), *modified on other grounds on denial of reh'g*, 932 F.2d 369 (5th Cir. 1991); *see also Moore v. Zant*, 885 F.2d 1497, 1503 (11th Cir. 1989).

Second, the majority errs in frustrating the district court's duty to construct proper sentences from a holistic examination of the intertwined acts of criminality for which the defendants were convicted. The majority remedies the error with respect to Davis and Glover's convictions under § 924(c)'s residual clause by reaching into their sentences and excising a period of time. But the aggregate sentences here—combinations of concurrent and consecutive sentences for different counts—resulted from a sentencing judgment by the district court. "'A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent.'" *Pepper v. United States*, 562 U.S. 476, 507 (2011) (quoting *United States v. Stinson*, 97 F.3d

466, 469 (11th Cir. 1996) (per curiam)). It is for the district court—not this court—to reach sentencing decisions in the first instance. "[A] district court's 'original sentencing intent may be undermined by altering one portion of the calculus'"—here reductions by 120 months of the defendants' 608-month and 498-month sentences. *Id.* (quoting *United States v. White*, 406 F.3d 827, 832 (7th Cir. 2005)). The majority concludes that excision of the sentences associated with Davis and Glover's Count Two convictions does not implicate their sentences relative to other counts, citing to our *Clark* decision. *Supra* at 5. But *Clark* was an appeal from a *district court's* decision. *Clark*, 816 F.3d at 354. There, the district court had determined that, after excision of time associated with a dismissed conviction, the petitioner's remaining aggregate sentence entailed an appropriate package without further adjustment. *Id.* at 360. If the instant case were an appeal from a district court's resentencing of Davis and Glover, I would find *Clark* controlling and reliance upon it sound. Today's decision, however, involves the Court of Appeals making that determination. A district court declining to adjust the remaining parts of its original sentencing package does not speak to an appellate invasion of the district court's sentencing prerogatives.

The appropriate remedy is to vacate Davis and Glover's entire sentences and remand for resentencing. *See United States v. Aguirre*, 926 F.2d 409, 410 (5th Cir. 1991) (Rubin, Politz, Davis) ("The proper remedy . . . is to vacate the entire sentence and remand for resentencing."). Such a disposition is especially appropriate where the district court in any event under current law may well be faced with constructing a new sentencing package. This because, lurking in the back-

ground of the majority's disposition in this case is another issue: the sentencing package here also included Davis's ACCA sentence enhancement predicated on convictions for Texas burglary. Were Davis resentenced, the district court would consider current law, including *United States v. Herrold*. 883 F.3d 517 (5th Cir. 2018) (en banc), *petitions for cert. filed*, (U.S. Apr. 18, 2018) (No. 17-1445), and (U.S. May 21, 2018) (No. 17-9127); *see Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987). Management of the sentencing process is best left to the court charged with the task and best situated to accommodate it. Here it should have the opportunity to revisit the entirety of the sentencing package including whether to defer resentencing pending the Supreme Court's disposition of petitions for certiorari in *Herrold*. The district court has been denied that opportunity. District courts are not mere "gatekeepers," and sentences often—as here—present as packages effectuating the district court's sentencing intent, as Chief Justice Rehnquist would remind.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-10330

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MAURICE LAMONT DAVIS; ANDRE LEVON GLOVER,
DEFENDANTS-APPELLANTS

Filed: Jan. 31, 2017

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CR-94

Before: HIGGINBOTHAM, JONES, and HAYNES, Circuit Judges.

PER CURIAM:*

Andre Levon Glover appeals his conviction and sentence and Maurice Lamont Davis appeals his sentence[1] in this case arising out of a series of similar robberies

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Although his prayer styles his challenges as directed only to his sentence, Davis seeks to vacate the convictions on Counts 2 and 7 as part of his requested resentencing.

at Murphy Oil locations across the Dallas Metroplex area during June of 2014.[2] We AFFIRM.

Glover's Challenge to his Hobbs Act Convictions. Glover challenges his convictions charging robberies in violation of the Hobbs Act which makes it unlawful to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery." 18 U.S.C. § 1951(a). Glover contends that the Government failed to prove the necessary impact on interstate commerce because all the robberies occurred within one state and only impacted merchandise (cartons of cigarettes) at local stores.[3] While conceding that the cigarettes themselves were manufactured out of state, Glover argues that the inventory and replacement inventory came from local Murphy Oil distribution centers or other stores. He also contends that the evidence was insufficient to connect him to two of the robberies (June 16 and 21).

This court reviews a challenge to the sufficiency of the evidence supporting a conviction by reviewing the evidence in the "light most favorable to the verdict to determine whether a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt."

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[2] Counts 1 and 3-6 charged conspiracy and aiding and abetting Hobbs Act (18 U.S.C. § 1951) robberies; Counts 2 and 7 were firearms charges under 18 U.S.C. § 924(c)(1). Count 8 asserted only against Davis, was for felon-in-possession of a firearm under 18 U.S.C. § 922(g)(1).

[3] Glover also argues that the Government should be required to prove a "substantial effect" on interstate commerce but concedes that this argument is foreclosed by precedent. *United States v. Robinson*, 119 F.3d 1205, 1215 (5th Cir. 1997).

United States v. Lewis, 774 F.3d 837, 841 (5th Cir. 2014) (citation omitted).

The Hobbs Act requires an effect on interstate commerce that is "identical with the requirements of federal jurisdiction under the Commerce Clause." *United States v. Villafranca*, 260 F.3d 374, 377 (5th Cir. 2001) (citation omitted). The defendant's activity on interstate commerce "need only be slight" but cannot be "attenuated." *Id.* (citation omitted). Here, cigarettes, a highly regulated commodity, travelled in interstate commerce and, following the robberies, had to be replaced by cigarettes that were manufactured and shipped from other states. While the Murphy Oil stores were local, the company itself is headquartered outside of Texas and conducts business in half the states. We conclude that the evidence was sufficient to support the interstate commerce nexus.

With respect to Glover's other sufficiency challenge, we note that Glover was apprehended following the second robbery on June 22. The similarities of the vehicles used, the clothing worn, the weapons employed, the items stolen, and the modus operandi between the June 22 robberies on the one hand and the June 16 and 21 robberies on the other are sufficient to support a conclusion by a rational juror beyond a reasonable doubt that the same person committed all of the robberies.

Glover's and Davis's Challenges to Counts 2 and 7. Both Glover and Davis contend that their convictions under 18 U.S.C. § 924(c) cannot stand in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which found a different statutory section to be unconstitutionally vague. In *Johnson*, the Court found the fol-

lowing portion of 18 U.S.C. § 924(e)(2)(B)(ii), known as the residual clause, defining "violent felonies" unconstitutionally vague: "or otherwise involves conduct that presents a serious potential risk of physical injury to another." In contrast to that language, § 924(c) involves the phrase "crime of violence" which, in turn, is defined, in relevant part, as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B).

Sitting en banc, we recently considered a similar argument involving 18 U.S.C. § 16(b), which contains the exact language of § 924(c)(3)(B), and held that the language is not unconstitutionally vague in light of *Johnson*. *United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc), *petition for cert. filed*, (Sept. 29, 2016)(No. 16-6259). We reasoned that in contrast to the residual clause language at issue in *Johnson*, the risk of physical *force* in 18 U.S.C. § 16(b)—as opposed to the risk of physical *injury*—is more definite. *Id.* at 676. We concluded that by requiring the risk of physical force to arise "in the course of committing" the offense, the provision "does not allow courts to consider conduct or events occurring after the crime is complete." *Id.* (citation omitted).

We recognize the possibility that identical language in two different statutes could be differently construed but see no reason to do so here. We join several other circuits in concluding that *Johnson* does not invalidate § 924(c)(3)(B). *See United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016); *United States v. Hill*, 832 F.3d 135, 145-49 (2d Cir. 2016); *United States v.*

Taylor, 814 F.3d 340, 376-79 (6th Cir. 2016), *petition for cert. filed*, (Oct. 6, 2016)(16-6392).[4] We therefore do not reach the question of whether the Hobbs Act robbery charges would include a "use of force" element under 18 U.S.C. § 924(c)(3)(A).

Davis's Challenge to the Armed Career Criminal Act (ACCA) Enhancement. Davis argues that his prior convictions under Texas law for burglary of a building are not "crimes of violence" for purposes of the ACCA because the statutes under which he was convicted, Texas Penal Code § 30.01(a)(1) and (a)(3), are not divisible under *Mathis v. United States*, 136 S. Ct. 2243 (2016), and some parts of these statutes do not qualify as "crimes of violence." However, he concedes that this challenge is foreclosed by our recent decision in *United States v. Uribe*, 838 F.3d 667, 669 (5th Cir. 2016).

Glover's Challenge to the "Abduction" Sentencing Enhancement. Glover contends that the district court erroneously enhanced his sentence for abduction in the June 16 (Lancaster), June 21 (Dallas), and June 22 (Mansfield) robberies because the movement of store clerks does not constitute a forced accompaniment to a "different location" within the meaning of U.S.S.G. § 2B3.1(b)(4)(A). Glover notes that the original PSR, which listed a criminal history score of I and an offense level of 28, did not contain the enhancement, presuma-

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[4] Glover's alternative argument that the jury should decide what constitutes a crime of violence is meritless. A determination of whether a Hobbs Act robbery and respective conspiracy offenses should be classified as a crime of violence is a question of law reserved for the judge. *United States v. Credit*, 95 F.3d 362, 364 (5th Cir. 1996).

bly referring to the June 21 robbery (Dallas) because the enhancement was present for the Lancaster and Mansfield robberies. After the Government objected, the probation officer agreed that the enhancement was appropriate for the June 21 robbery. However, both the Government and the probation officer noted that, because of groupings of multiple counts, the enhancement for June 21 (Dallas) did not affect the guidelines calculation.[5] Indeed, Glover was sentenced on Counts 1 and 3-6 premised on Guidelines calculations that yielded a criminal history score of I and an offense level of 28, the same as it was before the enhancement for the June 21 (Dallas) robbery. Glover was sentenced to 78 months, the bottom of the Guidelines range, for those counts.[6] Given the specifics of the calculations in this case, if either the June 16 (Lancas-

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[5] Glover does nothing to explain the math underlying the alleged error. However, an examination of the PSR illuminates the issue. The page to which Glover cites to support his argument that his sentence was enhanced by the abduction enhancement is a page from the Addendum to the PSR which states: "The inclusion of such [abduction] enhancement . . . does not affect the guideline computations." His brief states that his total offense level was increased by two levels due to this enhancement. This statement presumably refers to the two counts premised on the Lancaster and Mansfield robberies where the enhancement caused his offense level to be 24 which, in turn, was the "highest offense" level to which the multiple count adjustment of four was added. Had the enhancement not been in place for any count, the next "highest offense level" was 22. In turn, with the addition of the multiple count adjustment of four levels, his offense level would have been 26, rather than 28.

[6] Glover received consecutive sentences of 120 months and 300 months on Counts 2 and 7, respectively, for a total of 498 months.

ter) or the June 22 (Mansfield) enhancements were proper, then there would be no effect on his guidelines range making any error as to any other count harmless. *United States v. Castro-Alfonso*, 841 F.3d 292, 294 (5th Cir. 2016) (harmless error review applies to procedural sentencing errors).

We review the district court's application of the Sentencing Guidelines de novo and its factual findings for clear error. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008) (citation omitted). "There is no clear error if the district court's finding is plausible in light of the record as a whole." *Id.* (citation omitted).

The Guidelines direct a court to enhance a defendant's sentence by four levels "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." U.S.S.G. § 2B3.1(b)(4)(A). The Guidelines define "abducted" to mean that "a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction." § 1B1.1 cmt.n.1.

The term "different location" is interpreted on a case-by-case basis. *United States v. Hawkins*, 87 F.3d 722, 726-28 (5th Cir. 1996). The term is "flexible and thus susceptible of multiple interpretations" and is "not mechanically based on the presence or absence of doorways, lot lines, thresholds, and the like." *Id.* at 728. In *Hawkins*, this court held that, despite escaping, the victims were "abducted" when a gunman forced them to walk approximately 40 to 50 feet from a location near his truck to a location near a van in the same parking lot. *Id.* at 728.

During the robbery of the Lancaster Murphy Oil on June 16, the store clerk testified that Glover's accomplice grabbed her from behind and forced her to go from the main kiosk "to the back part of the storage building" where the inventory is kept. The clerk was told to open the door and then "he forced [her] down once [she] got in the [storage] room." The robbery of the Mansfield Murphy Oil on June 22 occurred under similar circumstances. The clerk testified that as she was dragging the candy rack out of the storage room, a robber held a gun to her head and told her to get back into the storage room. The PSR concluded from the Lancaster and Mansfield robberies that the clerks were forced "to move from one area to another area, namely, the outside of the kiosk to the inside of the storage room," constituting abduction under § 2B3.1(b)(4)(A). We agree and conclude that the district court did not err in applying this enhancement.

Concluding that all of Davis's and Glover's challenges fail, we AFFIRM.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:15-CR-094-0(2)

UNITED STATES OF AMERICA

v.

MAURICE LAMONT DAVIS

Filed: Mar. 17, 2016

SENTENCING TRANSCRIPT

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THE COURT: Okay. Then there's a supervised release term on counts one, five, six, and eight of 1 to 3 years.

And on count two and seven, 2 to 5 years.

A fine range on counts one, two, five, six, seven, and eight of between $12,000 and $125,000.

And, of course, there's a mandatory special assessment of $100 per count.

Okay. Does the Government wish to be heard on sentencing?

MR. KULL: Just briefly, Your Honor. In the housekeeping matter that we addressed in codefendant's sentencing, Mr. Ogan joined with Mr. Mongaras in the defendant's Motion to Dismiss Counts Two and Seven prior to trial, document 56—ECF document 56 which the Government responded in document 59 on the motion to dismiss the counts and the Court, once again, had indicated during trial that it would take it up at sentencing so—

THE COURT: I will deny that objection or motion to dismiss, I should say.

MR. KULL: Thank you, Your Honor. I don't want the belabor the same argument I made for one code-

fendant is applicable with a couple of variations with regard to Mr. Davis because apparently now you are meeting the person which stands before you was the bad influence over the poor impressionable Mr. Glover and that would be Mr. Davis, the * * *

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APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:15-CR-094-0(1)

UNITED STATES OF AMERICA

v.

ANDRE LEVON GLOVER

Filed: Mar. 13, 2016

SENTENCING TRANSCRIPT

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[5]

MR. KULL: We do, Your Honor. But as a matter of housekeeping first, there was a motion filed by I believe both defendants prior to trial. It was the defendant's Motion to Dismiss Counts Two and Seven, ECF documents 56, based on unconstitutionality of the vagueness with the *Johnson* decision.

The Government responded to that in Government's Exhibit—or ECF document 59 as the Government's response to the defendant's Motion to Dismiss Counts Two and Seven.

I believe—if I remember correctly during trial the Court had indicated that it would rule on that at the sentencing and, of course, he's trying to get—the Defense is trying to get the 924(c) dismissed, so I'm assuming that the Court is going to deny that motion by the defense?

THE COURT: Yes.

MR. KULL: Okay. Thank you. With regard to punishment, Your Honor, I heard the term used earlier today, the "heinous nature of the offense," and that particularly applies in this particular case.

You had two individuals who were unemployed who obviously had gone through great planning and care in order to effectuate the robbery of four innocent people

who were working the graveyard shift that nobody else really wanted to work. The nature of the offense is particularly disturbing knowing that at the time of the offense Mr. Glover was on * * *

* * * * *

APPENDIX E

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

3. 18 U.S.C. 922(g) provides in pertinent part:

Unlawful acts

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with

any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prose-

cuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

5. 18 U.S.C. 1951 provides:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all

other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

No. 18-431

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

The government's petition asks the Court to decide whether 18 U.S.C. § 924(c)(3)(B)—the residual clause of the statute's definition of "crime of violence"—is unconstitutionally vague. This case is not the right vehicle to decide that question, for several reasons.

First, the government invited the purported error about which it now complains. The government does not seriously dispute that, if § 924(c)'s residual clause is construed to require a categorical approach to identifying a "crime of violence," it is unconstitutionally vague. It argues instead that the lower courts erred by applying a categorical approach rather than a conduct-based one. But that is precisely what the government urged the lower courts to do: in its response to a motion to dismiss, in the proposed jury instructions, and in the initial appeal. And the government was successful: the district court instructed the jury that Respondents' conspiracy offenses were "crimes of violence" as a matter of law, thereby depriving Respondents of the opportunity to dispute that their conduct in this case satisfied the statutory definition. Principles of invited error, waiver, and judicial estoppel all bar the government, having obtained Respondents' convictions under a categorical reading of the statute, from now arguing in this case that such a reading is erroneous. In turn, these principles also stand as an obstacle to the resolution of the question presented here.

Second, the question presented has no impact on the outcome of this case. The Fifth Circuit vacated Respondents' § 924(c) convictions under Count Two of the indictment, which alleged the use of a firearm in furtherance of a conspiracy to commit Hobbs Act robbery, because "Defendants could only have been con-

victed as to Count Two under the residual clause," and § 924(c)'s residual clause is unconstitutionally vague. Pet. App. 4a–5a. But even if this Court were to uphold the residual clause, the result would not change. If the government's conduct-based approach to the residual clause is correct, then (as the government concedes) applying the clause requires "a jury finding beyond a reasonable doubt about the 'real-world conduct' proved in the case." Pet. 12. No such finding was sought or made. Nor did the indictment allege that Respondents' conduct in this case satisfied the residual clause. Consequently, on the government's own account of the statute, Respondents' convictions would violate their rights to indictment, due process, and trial by jury.

Further, any deprivation of the right to a jury trial would not be harmless. The indictment's failure to allege facts supporting application of the residual clause is structural error, and the omission of this element from the jury charge was not uncontested, barring any harmless error finding.

At the very least, these issues present threshold questions the Court would need to decide before reaching the question presented, lest it render an advisory opinion. At most, they demonstrate at the outset that the question presented has no effect on the judgment below. In either case, they show that the Court should not grant review in this case when it can easily decide the question in another case without these vehicle problems. Certainly, the government can wait for a case in which it has not actively sought to deprive the defendant of the fundamental right to a jury trial it now says applies here.

Third, the government's petition is premature. Only six circuits have considered the question presented after *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), and

only one has done so *en banc*. The courts of appeals may yet converge on a consensus view that renders this Court's review unnecessary. In all events, granting review now would truncate the evolving arguments for and against the statute's validity. Further percolation, by contrast, would ensure that (if the split remains) this Court will benefit from the most developed and sharpened versions of those arguments.

Fourth, the decision below was correct. Section 924(c)'s residual clause shares the same textual features that prompted this Court to apply the categorical approach under the residual clauses of the Armed Career Criminal Act (ACCA) and the "crime of violence" definition in 18 U.S.C. § 16(b). In particular, the § 924(c) residual clause's insistence on judging an "offense" "by its nature" makes clear that the clause "tells courts to figure out what an offense normally—or . . . 'ordinarily'—entails, not what happened to occur on one occasion." *Dimaya*, 138 S. Ct. at 1217–18 (plurality opinion). These parallels are unsurprising, as § 924(c)'s legislative history shows that its "crime of violence" definition grew out of § 16 and was intended to be applied in the same way. Indeed, that is how the courts of appeals have interpreted the residual clause for years, and Congress—despite often amending § 924(c), including in response to judicial decisions it disagrees with—has never acted to modify that approach.

The canon of constitutional avoidance cannot overcome the clear statutory text, this Court's precedents construing materially identical clauses, and § 924(c)'s legislative history. Avoidance requires more than one plausible reading of the statute. Here, there is only one: a categorical reading that considers the "nature" of an offense in the abstract. The government's pro-

posed alternative reading renders the phrase "by its nature" superfluous and requires the word "offense" to have two different meanings in the same provision. The avoidance canon does not license such departures from normal interpretive principles. Consequently, the Fifth Circuit was correct that § 924(c)'s residual clause must be applied categorically, and equally correct that it is therefore invalid under *Dimaya*.

The Court should deny the petition and, if the question presented still requires resolution, await another case where the question was properly preserved and will affect the outcome.

REASONS TO DENY THE PETITION

I. THE GOVERNMENT INVITED AND WAIVED ANY ERROR WHEN IT REPEATEDLY INSISTED ON THE CATEGORICAL APPROACH BELOW.

The government contends that the Fifth Circuit "erred in construing 18 U.S.C. § 924(c)(3)(B)" to require the categorical "ordinary case" approach. Pet. 11–12. But that is exactly what the government advocated below. The government had several opportunities to express a different view. Not only did the government fail to object to the categorical approach, it actively advocated for it at every turn. In doing so, the government invited the very "error" it now complains of and waived any argument that the lower courts should have construed the § 924(c) residual clause differently. The government has positioned itself poorly to invoke this Court's discretionary jurisdiction to vindicate a position it fought against in the lower courts.

This issue first arose in Respondents' pretrial Motion to Dismiss Counts Two and Seven of the indict-

ment. Respondents argued that, under the categorical approach, the § 924(c) residual clause was void for vagueness in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Defendants' Motion to Dismiss Counts Two and Seven at 1–6, *United States* v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Nov. 3, 2015), ECF No. 56. The government's response wholly embraced the categorical approach as the appropriate interpretive framework. The government acknowledged that the § 924(c) residual clause, like the statute in *Johnson*, involves an "ordinary-case inquiry," and insisted that the clause "does not go beyond the elements of the offense to consider potential extra-offense conduct." Government's Response to Defendants' Motion to Dismiss Counts Two and Seven at 3, 5, *United States* v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Nov. 5, 2015), ECF No. 59. And the government relied heavily on *Leocal* v. *Ashcroft*, see *id.* at 6, in which this Court construed § 16 to "require us look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime," 543 U.S. 1, 7 (2004). In short, the government "advocated an ordinary-case categorical approach . . . under Section 924(c)(3)(B)," cf. Pet. 12, urging the district court to apply the § 924(c) residual clause the same way this Court applied § 16(b) in *Leocal*—categorically.

The government's second (and best) opportunity to object to the categorical approach was in its proposed jury instructions. Again it took the opposite tack. The government, joined by Respondents, proposed a jury charge under which the district court would apply § 924(c)'s "crime of violence" definition categorically and instruct the jury that robbery and conspiracy to commit robbery were "crimes of violence" as a matter of law. See Agreed Jury Charge at 30, *United States*

v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Nov. 11, 2015), ECF No. 64 ("I instruct you that the crimes alleged in Counts One and Six are crimes of violence."). This phrase remained in the final jury charge, unaltered and without objection. Jury Charge at 13, *United States* v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Nov. 19, 2015), ECF No. 82 ("Jury Charge"); see Fed. R. Crim. P. 30(d) ("Failure to object [to a jury instruction] in accordance with this rule precludes appellate review . . . .").

The government's third opportunity came in its response to Mr. Glover's initial appeal. Mr. Glover argued that the district court erred by refusing to let the jury decide whether Hobbs Act Robbery or Conspiracy to Commit Hobbs Act Robbery were "crimes of violence" under § 924(c). Initial Brief for Appellant at 25–26, *United States* v. *Davis*, No. 16-10330 (5th Cir. Sept. 14, 2016). In response, the government argued that "the [jury] instruction was correct" and that Mr. Glover's "argument should be rejected because he invited the court to instruct the jury as it did." Brief for the United States, *United States* v. *Davis*, No. 16-10330 (5th Cir. Oct. 17, 2016). But what is good for the goose is good for the gander: if the government is held to the same waiver standard it urged below, it too must accept the jury instruction it affirmatively advocated, under which the § 924(c) residual clause is applied categorically.

The government first "attempt[ed] to change its prior approach to these cases" in its supplemental briefing in the Fifth Circuit, Pet. App. 4a, after this case had already been remanded by this Court in light of *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). *Dimaya*, of course, did not change the text of § 924(c). Indeed, it confirmed that an identically worded statute requires the categorical approach. At most, *Di-*

maya's constitutional holding created a new *incentive* for the government to read the statute differently. If litigation is to be more than a game, however, a party cannot reverse its position merely because that position turns out to be less advantageous than it previously seemed.

The government's attempt to reverse course here is particularly inappropriate because the conduct-based approach would have benefited Respondents at trial. Under the conduct-based approach, the district court would have had no choice but to dismiss Count Two because the grand jury did not allege that the conspiracy, by its nature, presented a substantial risk of force against the person or property of another. Further, Respondents lost the chance to argue to the jury that the facts of this particular conspiracy did not constitute a crime of violence.

Having secured Respondents' indictment and conviction by relying on the categorical approach, the government cannot now attempt to preserve those victories by adopting the opposite interpretation of the statute. See *Zedner* v. *United States*, 547 U.S. 489, 504 (2006) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."). The government successfully avoided a jury trial on the risk of force by arguing for the categorical approach. Now, without offering Respondents a jury trial, it wants this Court to hold that they should have been given one. This Court can surely find a way to address this question, if necessary, without condoning the government's contortions in this case.

For these reasons, this is not the appropriate case to decide whether the § 924(c) residual clause requires a categorical approach. The Court should wait for a case where the issue was timely raised and preserved by the party seeking review. That might be a case arising from a circuit that has adopted a conduct-based approach after *Dimaya* or (at the very least) a case in which the government objected to the categorical approach in the district court. Neither occurred here.

II. THE ANSWER TO THE QUESTION PRESENTED WILL NOT AFFECT THE OUTCOME OF THIS CASE.

Respondents were convicted under a reading of the § 924(c) residual clause that permitted the district judge to decide—and to instruct the jury—that their predicate offenses were categorically "crimes of violence" as a matter of law. The Fifth Circuit vacated Respondents' § 924(c) convictions on Count Two because, so construed, the § 924(c) residual clause is unconstitutionally vague. Pet. App. 6a.

Even if this Court were to grant review and uphold the residual clause, that holding would have no effect on the outcome of this case: Respondents' convictions on Count Two would remain vacated. Contra Pet. 25–26. Accordingly, there is no basis to disturb the judgment below. See *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions."); Stern & Gressman, *Supreme Court Practice* § 4.I.4(f), p. 249 (10th ed. 2013) (even "a clear conflict" does not warrant review if it "is irrelevant to the ultimate outcome"). In the government's own words, "this case would be a poor vehicle for addressing the question presented" because "a decision in [the government's] favor on the question presented would not change the

result in this case." *E.g.*, Brief for the United States in Opposition at 14–15, *Piszel* v. *United States*, 138 S. Ct. 85 (2017) (No. 16-1356), 2017 WL 3447922.

That is true for two related reasons: (1) if a conduct-based approach is appropriate, then the indictment and jury instructions violated the Fifth and Sixth Amendments; and (2) these errors were not harmless, but structural.

First, if the government is correct that § 924(c)'s residual clause requires a conduct-based approach, then the clause's application becomes an element of the offense, requiring (as the government admits) "a jury finding beyond a reasonable doubt." Pet. 12. "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." See *Alleyne* v. *United States*, 570 U.S. 99, 103 (2013); *accord In re Winship*, 397 U.S. 358, 364 (1970). Thus, if the government is right, the indictment had to allege that Respondents' offense conduct presented a substantial risk of the use of physical force, and the prosecution had to prove it to the jury.

None of that happened here. The grand jury did not find, and the indictment did not allege, that the conspiracy in Count One "by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." See 18 U.S.C. § 924(c)(3)(B). And the trial jury was never asked to apply the § 924(c) residual clause's uncertain "risk" standard to the "nature" of the conspiracy because the district court instructed the jury that Respondents' offenses were categorically "crimes of violence" as a matter of law. Jury Charge 12–14. So, if § 924(c)'s residual clause is to be applied based on the facts of a particular case, Respondents' convictions would violate their

constitutional rights to indictment, due process, and trial by jury. U.S. Const. amends. V, VI; see *Apprendi* v. *New Jersey*, 530 U.S. 466, 477–78 (2000); *In re Winship*, 397 U.S. at 364.

Second, contrary to the government's argument, these errors would *not* be "harmless" under *Neder* v. *United States*, 527 U.S. 1 (1999). Pet. 26. To find that the omission of an essential element was harmless, the Court must conclude that "the omitted element was *uncontested* and supported by overwhelming evidence." *Neder*, 527 U.S. at 17 (emphasis added). *Neder* assumes that the defendant was on notice of the elements of the charged crimes, giving him a full and fair *opportunity to contest* the omitted element. That is not this case here. The government cannot invoke *Neder* for the proposition that the omitted element was "uncontested" in the evidence when the only reason that it was uncontested is that Respondents were not on notice that they *could* contest it. Had the law—and the government—given notice that defendants could contest the risk of force associated with their own, particular conspiracy, they could have investigated or presented evidence on that subject. At a minimum, Respondents could have testified to the jury about whether they were individually prepared to use force to complete the offense, or whether, instead, they were bluffing. The loss of this opportunity cannot be termed harmless.

Likewise, "an indictment is sufficient" only if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). If the government were correct that the conduct-based approach applies, the indictment in this case would have violated *Hamling*. Respondents had no notice that they had to (or even

could) defend factually against the "crime of violence" charge, which was treated as a legal issue for the judge rather than a factual issue for the jury. In fact, Fifth Circuit precedent at the time required this result. See Pet. App. 4a–5a; *United States* v. *Williams*, 343 F.3d 423, 431 (5th Cir. 2003).

This lack of notice is a structural error. Since early in the Nation's history, "it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone* v. *United States*, 361 U.S. 212, 215–16 (1960). Here, the grand jury alleged only that Respondents used a firearm during a "crime of violence" defined *categorically*; it did not charge any conduct specifically alleged to involve a substantial risk that physical force would be used "by its nature." See Indictment at 5, 10, *United States* v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Mar. 3, 2015), ECF No. 1. Thus, accepting the government's argument that Respondents' convictions should be affirmed would "destroy[] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone*, 361 U.S. at 217. Because "[d]eprivation of such a basic right is far too serious to be . . . dismissed as harmless error," vacatur is necessary even if the Court accepts the government's conduct-based approach. *Id.*

These issues underscore that this case is a poor vehicle. If the Court grants review, it will at least have to decide whether these errors were harmless or structural. The answer to that question, in turn, may prevent the Court from reaching the merits of the question presented. See *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the

case before them.'"). And even if it does not, there is no need to complicate the resolution of the question presented by granting review in this case instead of another case that does not present these threshold issues.

III. THE GOVERNMENT'S PETITION IS PREMATURE.

A. The circuit split is not entrenched and the arguments are not fully developed.

Just six circuits have considered the constitutionality of the § 924(c) residual clause in light of *Dimaya*. Pet. App. 1a–9a; *United States* v. *Barrett*, 903 F.3d 166 (2d Cir. 2018); *Ovalles* v. *United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc); *United States* v. *Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (per curiam); *United States* v. *Salas*, 889 F.3d 681 (10th Cir. 2018), *petition for cert. filed* (U.S. Oct. 3, 2018) (No. 18-428); *United States* v. *Douglas*, 907 F.3d 1 (1st Cir. 2018). Only the Eleventh Circuit has done so *en banc*. See *Ovalles*, 905 F.3d 1231. Many other cases are still pending below. It is still possible that the other circuits, after *en banc* reconsideration of their own precedent, will join the Eleventh in agreeing with the government. If that happens, review will be unnecessary. The Court should hesitate to review this issue until at least one circuit, sitting *en banc* after *Dimaya*, holds the § 924(c) residual clause unconstitutional. Until that time, further percolation may resolve the issue without this Court's intervention.

In all events, this Court should at least delay review so the parties' arguments and the lower courts' analyses can sharpen into their most focused and mature form. To illustrate: right now, the argument carrying the day for the government is the canon of constitutional avoidance. See *Barrett*, 903 F.3d at 178;

Ovalles, 905 F.3d at 1240; *Douglas*, 907 F.3d at 15–16. But the government's arguments based on constitutional avoidance and constitutional doubt did not see any traction until the Second Circuit decided *Barrett* on September 10, 2018. And the argument has continued to evolve in *Ovalles* and, most recently, in *Douglas*. See 907 F.3d at 15–16. There were different arguments prior to *Barrett*, and there will likely be new arguments after *Douglas*.

It is important to let this process develop so the Court may benefit from the best and final versions of the arguments being advanced, and from the views of additional courts of appeals. Granting review now, while the arguments and case law are in a state of dramatic flux, would prematurely terminate this salutary process. Conversely, delaying review would provide enormous benefit to this Court and may render review unnecessary.

The government contends that review cannot await further development. Not so. The present issue pertains only to a tiny fraction of 924(c) prosecutions: those involving not merely a crime of violence rather than a drug offense, but involving a particular crime of violence that does not involve the use of force as an element. The mine-run of completed bank robberies, Hobbs Act robberies, and carjackings all remain valid bases for § 924(c) liability under any interpretation.

B. The judgment below is not yet final.

Both Respondents have moved for panel rehearing on matters unrelated to the constitutionality of the § 924(c) residual clause. These petitions deal with the application of the ACCA sentencing enhancement in light of current Fifth Circuit precedent and the correct application of the sentencing package doctrine. Both grounds would require resentencing irrespective

of the outcome of the question presented. On November 27, 2018, the Fifth Circuit directed the government to respond to these petitions.

Until Respondents are resentenced, the government's petition is premature. And once Respondents are resentenced, the government would be free to seek certiorari in this case (if warranted) or any other.

IV. THE DECISION BELOW IS CORRECT.

A. The text of the § 924(c) residual clause requires a categorical approach, and this Court's precedents confirm it.

Section 924(c)'s residual clause provides, in full: "For purposes of this subsection the term 'crime of violence' means an offense that is a felony and . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). Two particular characteristics of this language call for a categorical approach: (1) the phrase "by its nature"; and (2) the function that the term "offense" performs in this provision. Moreover, the Court's precedents "have consistently understood [materially indistinguishable] language in the residual clauses of both the ACCA and § 16 to refer to 'the statute of conviction, not to the facts of each defendant's conduct.'" *Dimaya*, 138 S. Ct. at 1217 (plurality opinion).[1]

Like § 16(b), the § 924(c) residual clause uses the phrase "by its nature." The *Dimaya* plurality ex-

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[1] Section 16(b) covers "any . . . offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b).

plained that an "offense's 'nature' means its 'normal and characteristic quality.'" 138 S. Ct. at 1217 (plurality opinion); see also *id.* at 1233 (Gorsuch, J., concurring) ("the word 'nature' might refer to an inevitable characteristic of the offense; one that would present itself automatically, whenever the statute is violated"). Likewise, Black's Law Dictionary defines "nature" as "[a] fundamental quality that distinguishes one thing from another; the essence of something." *Nature*, Black's Law Dictionary (10th ed. 2014). And the Collins English Dictionary defines the phrase "by its nature" to mean that "things of that type always have that characteristic." *By Its Nature*, Collins English Dictionary (12th ed. 2014). Indeed, this Court has used "nature" in precisely this way to refer to a generic offense. See *James* v. *United States*, 550 U.S. 192, 207–08 (2007), *overruled by Johnson*, 135 S. Ct. 2551 (using "by its nature" to define the "ordinary case" approach); *Leocal*, 543 U.S. at 7 ("This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.").

Courts of appeals before *Dimaya* likewise understood the simple, plain meaning of "by its nature" to call for a categorical approach. As the Fifth Circuit aptly summarized, "the phrase 'by its nature' compels a categorical approach to determining whether an offense is a crime of violence under Section 16(b) . . . . The reason is clear: either a crime is violent 'by its nature' or it is not. It cannot be a crime of violence 'by its nature' in some cases, but not others, depending on the circumstances." *United States* v. *Velazquez-Overa*, 100 F.3d 418, 420–21 (5th Cir. 1996); see also *United States* v. *McGuire*, 706 F.3d 1333, 1336–37 (11th Cir. 2013) (similar); *United States* v. *Venegas-Ornelas*, 348 F.3d 1273, 1276 (10th Cir. 2003) (simi-

lar); *Sareang Ye* v. *I.N.S.*, 214 F.3d 1128, 1133 (9th Cir. 2000) (similar). These consistent interpretations lead to one conclusion: the residual clause "tells courts to figure out what an offense normally—or . . . 'ordinarily'—entails, not what happened to occur on one occasion." *Dimaya*, 138 S. Ct. at 1217–18 (plurality opinion).

Indeed, it is difficult to understand what role the phrase "by its nature" might play in the statute if not to demand the categorical approach. It is not at all clear how a court asked to decide whether the *facts* of an offense create the risk of force would approach its job differently than one asked to make the same determination based on *"the nature"* of those particular facts. By contrast, Respondents' interpretation—and the interpretation of every court to confront that language before *Dimaya*—gives the phrase a clear function: "the nature" of an offense is its statutory elements. Requiring that it pose a risk of force "by its nature" requires that it examine the elements of the statute, not the particular facts. Respondents' position—but not the government's—thus "avoid[s] a reading which renders [these] words altogether redundant." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995).

This reading is bolstered by the role of the term "offense" in the residual clause. "Offense" makes two appearances in § 924(c)(3): First, as a global term that is distributed across both the elements clause and the residual clause ("an offense that is a felony"); and second, as a stand-alone term in the residual clause ("in the course of committing the offense"). It is undisputed that the global term "offense," as distributed across both clauses, refers to the criminal violation generically rather than the facts of the case. But the government overlooks that it is *this* use of "of-

fense"—which is undisputedly categorical—to which the phrase "by its nature" attaches. In other words, the statute uses "by its nature," which refers to things that "always have [a given] characteristic," to refer back to the generic "offense that is a felony." All of this shows that the statute calls for a categorical inquiry.

The Court's precedents interpreting materially indistinguishable language in § 16(b) support the same reading. *Leocal* emphasized § 16(b)'s use of the phrase "by its nature" in concluding that "the statute directs our focus to the 'offense' of conviction . . . rather than to the particular facts relating to [the defendant's] crime." 543 U.S. at 7. And *Dimaya* again explained that § 16(b)'s text—which is materially identical to § 924(c)'s residual clause—"creates no draw: Best read, it demands a categorical approach." 138 S. Ct. at 1217 (plurality opinion). As the Court explained, the phrase "by its nature" supports a categorical interpretation, *id.*, and terms such as "conviction," "felony," and "offense" "are 'read naturally' to denote the 'crime as *generally* committed,'" *id.* (quoting *Nijhawan* v. *Holder*, 557 U.S. 29, 34 (2009)).

Because the § 924(c) residual clause's language is materially identical to § 16(b)'s, this Court should follow the same construction for the same textual reasons. To hold otherwise would be to assume that Congress intended the same language, as used in provisions serving very similar purposes, to be read in fundamentally different ways. There is no textual indication that Congress intended that anomalous result.

B. Section 924(c)'s legislative history shows that it was intended to be applied the same way as § 16.

Section 924(c)'s legislative history shows that Congress intended courts to use the categorical approach. Section 924(c) was initially enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968). The section imposed a mandatory minimum sentence for the use or carrying of a firearm in the commission of a felony. See *id.* § 102, 82 Stat. at 1223–24.

In 1984, Congress amended § 924(c) to abrogate *Simpson* v. *United States*, 435 U.S. 6 (1978), and *Busic* v. *United States*, 446 U.S. 398 (1980), which had in Congress's view "greatly reduced [the statute's] effectiveness as a deterrent to violent crime." S. Rep. No. 98-225, at 312 (1983). In keeping with the categorical approach, the Senate Report said that § 924(c) is targeted to reach specific *statutes* that "are precisely the type of extremely dangerous offenses for which a mandatory punishment for the use of a firearm is the most appropriate." *Id.*

However, the 1984 Amendment did not explicitly define "crime of violence" for § 924(c)'s purposes. Rather, Congress relied on the general definition of "crime of violence" found in § 16. *Id.* at 307 ("[T]he phrase is commonly used throughout the bill, and accordingly the Committee has chosen to define it for general application in title 18.") (footnote omitted); *id.* at 389 n.7 ("The term 'crime of violence' is defined in 18 U.S.C. 16 . . . ."); *id.* at 316 n.3 (similar); *id.* at 313 n.9 (similar). Under § 16's general definition, "crime of violence" meant "an offense . . . that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any felony that, by its nature, involves the

substantial risk that physical force against another person or property may be used in the course of its commission." *Id.* at 307.

Finally, in 1986, Congress amended § 924(c) to explicitly define "crime of violence"—using the same language as § 16. See Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(F), 100 Stat. 449, 457 (1986); S. Rep. No. 98-583, at 22 (1984) (noting the "amendment to Section 924(c) which, with some modifications, incorporates virtually verbatim the language from . . . the Comprehensive Crime Control Act of 1984"). Thus, § 924(c)'s "crime of violence" definition grew out of § 16's definition of the same term. This history, together with the close linguistic parallels, shows that § 924(c)(3) must be construed—like § 16—to require the categorical approach.

C. Congress has acquiesced in the court of appeals' long-standing and consistent application of the categorical approach under § 924(c).

In the nearly thirty years since this Court created the categorical approach in *Taylor*, the overwhelming majority of circuits have followed the Court's lead by applying the categorical approach under § 924(c). See, *e.g.*, *United States* v. *Taylor*, 814 F.3d 340, 378 (6th Cir. 2016) (observing that the § 924(c) residual clause "requires the application of a categorical approach"), *cert. denied*, 138 S. Ct. 1975 (2018); *United States* v. *Amparo*, 68 F.3d 1222, 1224 (9th Cir. 1995) (applying "a categorical approach to determining which offenses are included under section 924(c) as 'crimes of violence'"); *United States* v. *Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (holding that the text of the § 924(c) residual clause requires a categorical approach), *abrogation recognized by United States* v. *Torres-Villalobos*, 487 F.3d 607 (8th Cir. 2007). Prior to *Ovalles*, the

Second and Eleventh Circuits likewise applied the categorical approach to both the residual and elements clauses of § 924(c) without qualification. See *United States* v. *Hill*, 890 F.3d 51, 55 (2d Cir. 2018) (explaining that "the categorical approach is '"not only consistent with both precedent and sound policy' but [ ] also . . . 'necessary in view of the language of [§ 924(c)]'" (first alteration in original)); *McGuire*, 706 F.3d at 1336–37 (applying the categorical approach to both clauses).

Congress, meanwhile, has been notably silent on the courts of appeals' widespread adoption of the categorical approach, despite a demonstrated willingness over the same period of time to take swift corrective action in the wake of what it views as problematic judicial decisions involving § 924(c).

For example, in 1984, Congress wasted little time in amending § 924(c)(1) in direct response to *Simpson* and *Busic*. See *supra* § IV.B. That vigilance was once again on display in 1998, when Congress approved the "Bailey Fix Act," see 144 Cong. Rec. 26608 (1998), in direct response to a series of decisions in which the Court wrestled with the meaning of the terms "use" and "carry" in § 924(c)(1). *E.g.*, *Bailey* v. *United States*, 516 U.S. 137 (1995), *superseded by statute as recognized in Welch* v. *United States*, 136 S. Ct. 1257 (2016). Unhappy with the limiting effect of these decisions, Congress responded by making it an offense under § 924(c)(1) to "posses[s]" a firearm "in furtherance of" one of the predicate offenses and adding sentencing enhancements for brandishing and discharge. See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998).

Since that time, Congress has continued to amend § 924(c) to expand, refine, or clarify its terms. *E.g.*, Protection of Lawful Commerce in Arms Act, Pub. L.

No. 109-92, § 6(b), 119 Stat. 2095, 2102 (2005); Act of Oct. 6, 2006, Pub. L. No. 109-304, § 17(d)(3), 120 Stat. 1485, 1707 (2006). Yet, despite the fact that Congress has repeatedly and substantially revised § 924(c)—including in response to the federal courts' construction of it—not once have lawmakers responded to the circuits' continued application of the categorical approach in cases dating back decades.

In light of the circuits' consistent, long-term, and nearly universal application of the categorical approach—and Congress's demonstrated willingness to overturn interpretations of § 924(c) it disagrees with—congressional silence on the issue speaks volumes. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 599 (1983) (finding that "Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence.").

D. The doctrine of constitutional avoidance does not permit a conduct-based interpretation of § 924(c).

The petition relies heavily on "the principle of constitutional avoidance." Pet. 20. This argument did not prevail in *Johnson*, 135 S. Ct. at 2562, or *Dimaya*, 138 S. Ct. at 1217, and it cannot do so here.

The avoidance canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005). "[A] court relying on that canon still must *interpret* the statute, not rewrite it." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018). Here, Section 924(c)'s text unambiguously requires a categorical

approach. The "upshot of all [the] textual evidence" discussed above is that § 924(c)'s residual clause—like the clauses in § 16(b) and the ACCA—"has no 'plausible' fact-based reading." *Dimaya*, 138 S. Ct. at 1218 (plurality opinion); see *Johnson*, 135 S. Ct. at 2562; *supra* § IV.A. Thus, "[i]n the absence of more than one plausible construction, the canon simply 'has no application.'" *Jennings*, 138 S. Ct. at 842.

The government's effort to show otherwise falls flat. In particular, it would make no sense to use the phrase "by its nature" to refer to the facts of a defendant's actual underlying conduct. Contra Pet. 16. A single discrete criminal act has no "fundamental quality"—or in Justice Gorsuch's term, no "inevitable characteristic"—that "distinguishes [it] from another" example of the same crime. See *supra* p. 15. Indeed, the government's reading of the statute would be exactly the same if the words "by its nature" were simply omitted: "[A]n offense that is a felony and . . . that . . . involves a substantial risk . . . ." A construction that would render some of the clause's language "inoperative or superfluous" is not a plausible one. See *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004).

Nor does the government find support in the standalone use of "offense" in the § 924(c) residual clause. See Pet. 13–14. Even if the word "offense" can, in a vacuum, refer either to a generic criminal violation or to a defendant's specific acts, see *id.*, it cannot do so here. Clause (c)(3)(B)'s language—"in the course of committing *the offense*"—refers back to the generic "offense that is a felony." "The use of the definite article means an [offense] specifically provided for" in the statutory text. See *Work* v. *United States ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200, 208 (1923). The only "offense" previously provided for in this subsection is the generic felony that applies to

both the elements clause and the residual clause. Thus, the phrase "the offense" in the residual clause—like "by its nature"—refers back to the generic use of "offense" in § 924(c)(3)'s introductory phrase.

Given all of this, there is no way for the word "offense" to carry a "case-specific meaning" in the residual clause. Pet. 14. The government's argument could prevail only if the very same use of the term "offense" in § 924(c)(3) meant one thing for purposes of the elements clause, but something different for purposes of the residual clause. But statutory language cannot change on a case-by-case basis—not even to avoid constitutional concerns. See *Clark*, 543 U.S. at 382 (rejecting a "novel interpretive approach . . . which would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case").

Finally, the government's position would give the § 924(c) residual clause a different meaning from the nearly identical language in § 16, which this Court has unanimously read to refer to "the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal*, 543 U.S. at 7; see also *id.* at 10. The Court confirmed the unambiguous nature of this language last Term in *Dimaya*, explaining that "the avoidance canon cannot serve . . . as the interpretive tie breaker" because § 16's language "demands a categorical approach." 138 S. Ct. at 1217 (plurality opinion). So too in *Johnson*, which rejected the avoidance argument because "'[t]he only plausible interpretation' of the [ACCA residual clause] . . . requires use of the categorical approach." 135 S. Ct. at 2562. Section 924(c)'s materially indistinguishable language requires the same result. There is no "competing

plausible interpretation[ ]" here. See *Clark*, 543 U.S. at 381–82.

E. Under the categorical approach, the § 924 residual clause suffers from the same fundamental defects as the ACCA residual clause and § 16(b).

Properly construed, the § 924(c) residual clause suffers from the same constitutional defects as the ACCA residual clause and § 16(b). All of these residual clauses "leave[] grave uncertainty about how to estimate the risk posed by a crime," offering "no reliable way to choose between . . . competing accounts" of what the ordinary case of the crime at issue may entail. *Johnson*, 135 S. Ct. at 2557–58. They further "leave[] uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. Section 924(c)'s definition of "crime of violence," then, "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

In *Dimaya*, this Court held that § 16(b)'s validity was "straightforwardly" resolved by *Johnson*. 138 S. Ct. at 1213 (plurality opinion). This was so because *Johnson*'s two-part reasoning applied equally to both residual clauses. *Id.* at 1216 (plurality opinion). Just as *Dimaya* was a straightforward application of *Johnson*, this case is a straightforward application of both *Johnson* and *Dimaya*.

Like its corollaries in the ACCA and § 16(b), the § 924(c) residual clause requires courts to assess the risk of the use of physical force by imagining what the "ordinary case" of a candidate for a "crime of violence" might be, but provides "no guidance on how to figure out what that ordinary case" constitutes. *Dimaya*, 138 S. Ct. at 1207–08. A judge is left to her own imagination in constructing the "ordinary case";

under the § 924(c) residual clause there could therefore be as many "ordinary cases" of the same crime as there are federal judges, and the statute provides no way to distinguish among them. See *Johnson*, 135 S. Ct. at 2558. The text of § 924(c)'s residual clause is exactly the same as the text of § 16(b) that was invalidated in *Dimaya*, see 138 S. Ct. at 1223 (plurality opinion), and is thus equally "speculative" and indeterminate, see *id.* at 1214.

The uncertainty of the "ordinary case" analysis is only exacerbated by the statute's fuzzy "substantial risk" standard, which provides no meaningful threshold for the quantum of risk needed to constitute a "crime of violence." Though the use of an imprecise qualitative standard such as "substantial risk" is not in itself unconstitutional, *Johnson* and *Dimaya* held that it *becomes* unconstitutional when a statute requires that it be applied "to an idealized ordinary case of the crime." *Dimaya*, 138 S. Ct. at 1214 (plurality opinion). The underlying indeterminacy of the "ordinary case" determination, plus the uncertainty of what constitutes "substantial risk," together make the § 924(c) residual clause so vague as to violate due process. See *id.* 1214–15.

In his concurrence in *Dimaya*, Justice Gorsuch wrote that § 16(b) "isn't your everyday ambiguous statute. It leaves the people to guess about what the law demands—and leaves judges to make it up. . . . Will, not judgment, dictates the result." *Dimaya*, 138 S. Ct. at 1232 (Gorsuch, J., concurring). The § 924(c) residual clause—containing the same language as § 16(b)—suffers from the same fatal flaws. The decision below was correct. Pet. App. 5a–6a.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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No. 18-431

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

The government's petition asks the Court to decide whether 18 U.S.C. § 924(c)(3)(B)—the residual clause of the statute's definition of "crime of violence"—is unconstitutionally vague. This case is not the right vehicle to decide that question, for several reasons.

First, the government invited the purported error about which it now complains. The government does not seriously dispute that, if § 924(c)'s residual clause is construed to require a categorical approach to identifying a "crime of violence," it is unconstitutionally vague. It argues instead that the lower courts erred by applying a categorical approach rather than a conduct-based one. But that is precisely what the government urged the lower courts to do: in its response to a motion to dismiss, in the proposed jury instructions, and in the initial appeal. And the government was successful: the district court instructed the jury that Respondents' conspiracy offenses were "crimes of violence" as a matter of law, thereby depriving Respondents of the opportunity to dispute that their conduct in this case satisfied the statutory definition. Principles of invited error, waiver, and judicial estoppel all bar the government, having obtained Respondents' convictions under a categorical reading of the statute, from now arguing in this case that such a reading is erroneous. In turn, these principles also stand as an obstacle to the resolution of the question presented here.

Second, the question presented has no impact on the outcome of this case. The Fifth Circuit vacated Respondents' § 924(c) convictions under Count Two of the indictment, which alleged the use of a firearm in furtherance of a conspiracy to commit Hobbs Act robbery, because "Defendants could only have been con-

victed as to Count Two under the residual clause," and § 924(c)'s residual clause is unconstitutionally vague. Pet. App. 4a–5a. But even if this Court were to uphold the residual clause, the result would not change. If the government's conduct-based approach to the residual clause is correct, then (as the government concedes) applying the clause requires "a jury finding beyond a reasonable doubt about the 'real-world conduct' proved in the case." Pet. 12. No such finding was sought or made. Nor did the indictment allege that Respondents' conduct in this case satisfied the residual clause. Consequently, on the government's own account of the statute, Respondents' convictions would violate their rights to indictment, due process, and trial by jury.

Further, any deprivation of the right to a jury trial would not be harmless. The indictment's failure to allege facts supporting application of the residual clause is structural error, and the omission of this element from the jury charge was not uncontested, barring any harmless error finding.

At the very least, these issues present threshold questions the Court would need to decide before reaching the question presented, lest it render an advisory opinion. At most, they demonstrate at the outset that the question presented has no effect on the judgment below. In either case, they show that the Court should not grant review in this case when it can easily decide the question in another case without these vehicle problems. Certainly, the government can wait for a case in which it has not actively sought to deprive the defendant of the fundamental right to a jury trial it now says applies here.

Third, the government's petition is premature. Only six circuits have considered the question presented after *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), and

only one has done so *en banc*. The courts of appeals may yet converge on a consensus view that renders this Court's review unnecessary. In all events, granting review now would truncate the evolving arguments for and against the statute's validity. Further percolation, by contrast, would ensure that (if the split remains) this Court will benefit from the most developed and sharpened versions of those arguments.

Fourth, the decision below was correct. Section 924(c)'s residual clause shares the same textual features that prompted this Court to apply the categorical approach under the residual clauses of the Armed Career Criminal Act (ACCA) and the "crime of violence" definition in 18 U.S.C. § 16(b). In particular, the § 924(c) residual clause's insistence on judging an "offense" "by its nature" makes clear that the clause "tells courts to figure out what an offense normally—or . . . 'ordinarily'—entails, not what happened to occur on one occasion." *Dimaya*, 138 S. Ct. at 1217–18 (plurality opinion). These parallels are unsurprising, as § 924(c)'s legislative history shows that its "crime of violence" definition grew out of § 16 and was intended to be applied in the same way. Indeed, that is how the courts of appeals have interpreted the residual clause for years, and Congress—despite often amending § 924(c), including in response to judicial decisions it disagrees with—has never acted to modify that approach.

The canon of constitutional avoidance cannot overcome the clear statutory text, this Court's precedents construing materially identical clauses, and § 924(c)'s legislative history. Avoidance requires more than one plausible reading of the statute. Here, there is only one: a categorical reading that considers the "nature" of an offense in the abstract. The government's pro-

posed alternative reading renders the phrase "by its nature" superfluous and requires the word "offense" to have two different meanings in the same provision. The avoidance canon does not license such departures from normal interpretive principles. Consequently, the Fifth Circuit was correct that § 924(c)'s residual clause must be applied categorically, and equally correct that it is therefore invalid under *Dimaya*.

The Court should deny the petition and, if the question presented still requires resolution, await another case where the question was properly preserved and will affect the outcome.

REASONS TO DENY THE PETITION

I. THE GOVERNMENT INVITED AND WAIVED ANY ERROR WHEN IT REPEATEDLY INSISTED ON THE CATEGORICAL APPROACH BELOW.

The government contends that the Fifth Circuit "erred in construing 18 U.S.C. § 924(c)(3)(B)" to require the categorical "ordinary case" approach. Pet. 11–12. But that is exactly what the government advocated below. The government had several opportunities to express a different view. Not only did the government fail to object to the categorical approach, it actively advocated for it at every turn. In doing so, the government invited the very "error" it now complains of and waived any argument that the lower courts should have construed the § 924(c) residual clause differently. The government has positioned itself poorly to invoke this Court's discretionary jurisdiction to vindicate a position it fought against in the lower courts.

This issue first arose in Respondents' pretrial Motion to Dismiss Counts Two and Seven of the indict-

ment. Respondents argued that, under the categorical approach, the § 924(c) residual clause was void for vagueness in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Defendants' Motion to Dismiss Counts Two and Seven at 1–6, *United States* v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Nov. 3, 2015), ECF No. 56. The government's response wholly embraced the categorical approach as the appropriate interpretive framework. The government acknowledged that the § 924(c) residual clause, like the statute in *Johnson*, involves an "ordinary-case inquiry," and insisted that the clause "does not go beyond the elements of the offense to consider potential extra-offense conduct." Government's Response to Defendants' Motion to Dismiss Counts Two and Seven at 3, 5, *United States* v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Nov. 5, 2015), ECF No. 59. And the government relied heavily on *Leocal* v. *Ashcroft*, see *id.* at 6, in which this Court construed § 16 to "require us look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime," 543 U.S. 1, 7 (2004). In short, the government "advocated an ordinary-case categorical approach . . . under Section 924(c)(3)(B)," cf. Pet. 12, urging the district court to apply the § 924(c) residual clause the same way this Court applied § 16(b) in *Leocal*—categorically.

The government's second (and best) opportunity to object to the categorical approach was in its proposed jury instructions. Again it took the opposite tack. The government, joined by Respondents, proposed a jury charge under which the district court would apply § 924(c)'s "crime of violence" definition categorically and instruct the jury that robbery and conspiracy to commit robbery were "crimes of violence" as a matter of law. See Agreed Jury Charge at 30, *United States*

v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Nov. 11, 2015), ECF No. 64 ("I instruct you that the crimes alleged in Counts One and Six are crimes of violence."). This phrase remained in the final jury charge, unaltered and without objection. Jury Charge at 13, *United States* v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Nov. 19, 2015), ECF No. 82 ("Jury Charge"); see Fed. R. Crim. P. 30(d) ("Failure to object [to a jury instruction] in accordance with this rule precludes appellate review . . . .").

The government's third opportunity came in its response to Mr. Glover's initial appeal. Mr. Glover argued that the district court erred by refusing to let the jury decide whether Hobbs Act Robbery or Conspiracy to Commit Hobbs Act Robbery were "crimes of violence" under § 924(c). Initial Brief for Appellant at 25–26, *United States* v. *Davis*, No. 16-10330 (5th Cir. Sept. 14, 2016). In response, the government argued that "the [jury] instruction was correct" and that Mr. Glover's "argument should be rejected because he invited the court to instruct the jury as it did." Brief for the United States, *United States* v. *Davis*, No. 16-10330 (5th Cir. Oct. 17, 2016). But what is good for the goose is good for the gander: if the government is held to the same waiver standard it urged below, it too must accept the jury instruction it affirmatively advocated, under which the § 924(c) residual clause is applied categorically.

The government first "attempt[ed] to change its prior approach to these cases" in its supplemental briefing in the Fifth Circuit, Pet. App. 4a, after this case had already been remanded by this Court in light of *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). *Dimaya*, of course, did not change the text of § 924(c). Indeed, it confirmed that an identically worded statute requires the categorical approach. At most, *Di-*

maya's constitutional holding created a new *incentive* for the government to read the statute differently. If litigation is to be more than a game, however, a party cannot reverse its position merely because that position turns out to be less advantageous than it previously seemed.

The government's attempt to reverse course here is particularly inappropriate because the conduct-based approach would have benefited Respondents at trial. Under the conduct-based approach, the district court would have had no choice but to dismiss Count Two because the grand jury did not allege that the conspiracy, by its nature, presented a substantial risk of force against the person or property of another. Further, Respondents lost the chance to argue to the jury that the facts of this particular conspiracy did not constitute a crime of violence.

Having secured Respondents' indictment and conviction by relying on the categorical approach, the government cannot now attempt to preserve those victories by adopting the opposite interpretation of the statute. See *Zedner* v. *United States*, 547 U.S. 489, 504 (2006) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."). The government successfully avoided a jury trial on the risk of force by arguing for the categorical approach. Now, without offering Respondents a jury trial, it wants this Court to hold that they should have been given one. This Court can surely find a way to address this question, if necessary, without condoning the government's contortions in this case.

For these reasons, this is not the appropriate case to decide whether the § 924(c) residual clause requires a categorical approach. The Court should wait for a case where the issue was timely raised and preserved by the party seeking review. That might be a case arising from a circuit that has adopted a conduct-based approach after *Dimaya* or (at the very least) a case in which the government objected to the categorical approach in the district court. Neither occurred here.

II. THE ANSWER TO THE QUESTION PRESENTED WILL NOT AFFECT THE OUTCOME OF THIS CASE.

Respondents were convicted under a reading of the § 924(c) residual clause that permitted the district judge to decide—and to instruct the jury—that their predicate offenses were categorically "crimes of violence" as a matter of law. The Fifth Circuit vacated Respondents' § 924(c) convictions on Count Two because, so construed, the § 924(c) residual clause is unconstitutionally vague. Pet. App. 6a.

Even if this Court were to grant review and uphold the residual clause, that holding would have no effect on the outcome of this case: Respondents' convictions on Count Two would remain vacated. Contra Pet. 25–26. Accordingly, there is no basis to disturb the judgment below. See *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions."); Stern & Gressman, *Supreme Court Practice* § 4.I.4(f), p. 249 (10th ed. 2013) (even "a clear conflict" does not warrant review if it "is irrelevant to the ultimate outcome"). In the government's own words, "this case would be a poor vehicle for addressing the question presented" because "a decision in [the government's] favor on the question presented would not change the

result in this case." *E.g.*, Brief for the United States in Opposition at 14–15, *Piszel* v. *United States*, 138 S. Ct. 85 (2017) (No. 16-1356), 2017 WL 3447922.

That is true for two related reasons: (1) if a conduct-based approach is appropriate, then the indictment and jury instructions violated the Fifth and Sixth Amendments; and (2) these errors were not harmless, but structural.

First, if the government is correct that § 924(c)'s residual clause requires a conduct-based approach, then the clause's application becomes an element of the offense, requiring (as the government admits) "a jury finding beyond a reasonable doubt." Pet. 12. "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." See *Alleyne* v. *United States*, 570 U.S. 99, 103 (2013); *accord In re Winship*, 397 U.S. 358, 364 (1970). Thus, if the government is right, the indictment had to allege that Respondents' offense conduct presented a substantial risk of the use of physical force, and the prosecution had to prove it to the jury.

None of that happened here. The grand jury did not find, and the indictment did not allege, that the conspiracy in Count One "by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." See 18 U.S.C. § 924(c)(3)(B). And the trial jury was never asked to apply the § 924(c) residual clause's uncertain "risk" standard to the "nature" of the conspiracy because the district court instructed the jury that Respondents' offenses were categorically "crimes of violence" as a matter of law. Jury Charge 12–14. So, if § 924(c)'s residual clause is to be applied based on the facts of a particular case, Respondents' convictions would violate their

constitutional rights to indictment, due process, and trial by jury. U.S. Const. amends. V, VI; see *Apprendi* v. *New Jersey*, 530 U.S. 466, 477–78 (2000); *In re Winship*, 397 U.S. at 364.

Second, contrary to the government's argument, these errors would *not* be "harmless" under *Neder* v. *United States*, 527 U.S. 1 (1999). Pet. 26. To find that the omission of an essential element was harmless, the Court must conclude that "the omitted element was *uncontested* and supported by overwhelming evidence." *Neder*, 527 U.S. at 17 (emphasis added). *Neder* assumes that the defendant was on notice of the elements of the charged crimes, giving him a full and fair *opportunity to contest* the omitted element. That is not this case here. The government cannot invoke *Neder* for the proposition that the omitted element was "uncontested" in the evidence when the only reason that it was uncontested is that Respondents were not on notice that they *could* contest it. Had the law—and the government—given notice that defendants could contest the risk of force associated with their own, particular conspiracy, they could have investigated or presented evidence on that subject. At a minimum, Respondents could have testified to the jury about whether they were individually prepared to use force to complete the offense, or whether, instead, they were bluffing. The loss of this opportunity cannot be termed harmless.

Likewise, "an indictment is sufficient" only if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). If the government were correct that the conduct-based approach applies, the indictment in this case would have violated *Hamling*. Respondents had no notice that they had to (or even

could) defend factually against the "crime of violence" charge, which was treated as a legal issue for the judge rather than a factual issue for the jury. In fact, Fifth Circuit precedent at the time required this result. See Pet. App. 4a–5a; *United States* v. *Williams*, 343 F.3d 423, 431 (5th Cir. 2003).

This lack of notice is a structural error. Since early in the Nation's history, "it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone* v. *United States*, 361 U.S. 212, 215–16 (1960). Here, the grand jury alleged only that Respondents used a firearm during a "crime of violence" defined *categorically*; it did not charge any conduct specifically alleged to involve a substantial risk that physical force would be used "by its nature." See Indictment at 5, 10, *United States* v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Mar. 3, 2015), ECF No. 1. Thus, accepting the government's argument that Respondents' convictions should be affirmed would "destroy[] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone*, 361 U.S. at 217. Because "[d]eprivation of such a basic right is far too serious to be . . . dismissed as harmless error," vacatur is necessary even if the Court accepts the government's conduct-based approach. *Id.*

These issues underscore that this case is a poor vehicle. If the Court grants review, it will at least have to decide whether these errors were harmless or structural. The answer to that question, in turn, may prevent the Court from reaching the merits of the question presented. See *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the

case before them.'"). And even if it does not, there is no need to complicate the resolution of the question presented by granting review in this case instead of another case that does not present these threshold issues.

III. THE GOVERNMENT'S PETITION IS PREMATURE.

A. The circuit split is not entrenched and the arguments are not fully developed.

Just six circuits have considered the constitutionality of the § 924(c) residual clause in light of *Dimaya*. Pet. App. 1a–9a; *United States* v. *Barrett*, 903 F.3d 166 (2d Cir. 2018); *Ovalles* v. *United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc); *United States* v. *Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (per curiam); *United States* v. *Salas*, 889 F.3d 681 (10th Cir. 2018), *petition for cert. filed* (U.S. Oct. 3, 2018) (No. 18-428); *United States* v. *Douglas*, 907 F.3d 1 (1st Cir. 2018). Only the Eleventh Circuit has done so *en banc*. See *Ovalles*, 905 F.3d 1231. Many other cases are still pending below. It is still possible that the other circuits, after *en banc* reconsideration of their own precedent, will join the Eleventh in agreeing with the government. If that happens, review will be unnecessary. The Court should hesitate to review this issue until at least one circuit, sitting *en banc* after *Dimaya*, holds the § 924(c) residual clause unconstitutional. Until that time, further percolation may resolve the issue without this Court's intervention.

In all events, this Court should at least delay review so the parties' arguments and the lower courts' analyses can sharpen into their most focused and mature form. To illustrate: right now, the argument carrying the day for the government is the canon of constitutional avoidance. See *Barrett*, 903 F.3d at 178;

Ovalles, 905 F.3d at 1240; *Douglas*, 907 F.3d at 15–16. But the government's arguments based on constitutional avoidance and constitutional doubt did not see any traction until the Second Circuit decided *Barrett* on September 10, 2018. And the argument has continued to evolve in *Ovalles* and, most recently, in *Douglas*. See 907 F.3d at 15–16. There were different arguments prior to *Barrett*, and there will likely be new arguments after *Douglas*.

It is important to let this process develop so the Court may benefit from the best and final versions of the arguments being advanced, and from the views of additional courts of appeals. Granting review now, while the arguments and case law are in a state of dramatic flux, would prematurely terminate this salutary process. Conversely, delaying review would provide enormous benefit to this Court and may render review unnecessary.

The government contends that review cannot await further development. Not so. The present issue pertains only to a tiny fraction of 924(c) prosecutions: those involving not merely a crime of violence rather than a drug offense, but involving a particular crime of violence that does not involve the use of force as an element. The mine-run of completed bank robberies, Hobbs Act robberies, and carjackings all remain valid bases for § 924(c) liability under any interpretation.

B. The judgment below is not yet final.

Both Respondents have moved for panel rehearing on matters unrelated to the constitutionality of the § 924(c) residual clause. These petitions deal with the application of the ACCA sentencing enhancement in light of current Fifth Circuit precedent and the correct application of the sentencing package doctrine. Both grounds would require resentencing irrespective

of the outcome of the question presented. On November 27, 2018, the Fifth Circuit directed the government to respond to these petitions.

Until Respondents are resentenced, the government's petition is premature. And once Respondents are resentenced, the government would be free to seek certiorari in this case (if warranted) or any other.

IV. THE DECISION BELOW IS CORRECT.

A. The text of the § 924(c) residual clause requires a categorical approach, and this Court's precedents confirm it.

Section 924(c)'s residual clause provides, in full: "For purposes of this subsection the term 'crime of violence' means an offense that is a felony and . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). Two particular characteristics of this language call for a categorical approach: (1) the phrase "by its nature"; and (2) the function that the term "offense" performs in this provision. Moreover, the Court's precedents "have consistently understood [materially indistinguishable] language in the residual clauses of both the ACCA and § 16 to refer to 'the statute of conviction, not to the facts of each defendant's conduct.'" *Dimaya*, 138 S. Ct. at 1217 (plurality opinion).[1]

Like § 16(b), the § 924(c) residual clause uses the phrase "by its nature." The *Dimaya* plurality ex-

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[1] Section 16(b) covers "any . . . offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b).

plained that an "offense's 'nature' means its 'normal and characteristic quality.'" 138 S. Ct. at 1217 (plurality opinion); see also *id.* at 1233 (Gorsuch, J., concurring) ("the word 'nature' might refer to an inevitable characteristic of the offense; one that would present itself automatically, whenever the statute is violated"). Likewise, Black's Law Dictionary defines "nature" as "[a] fundamental quality that distinguishes one thing from another; the essence of something." *Nature*, Black's Law Dictionary (10th ed. 2014). And the Collins English Dictionary defines the phrase "by its nature" to mean that "things of that type always have that characteristic." *By Its Nature*, Collins English Dictionary (12th ed. 2014). Indeed, this Court has used "nature" in precisely this way to refer to a generic offense. See *James* v. *United States*, 550 U.S. 192, 207–08 (2007), *overruled by Johnson*, 135 S. Ct. 2551 (using "by its nature" to define the "ordinary case" approach); *Leocal*, 543 U.S. at 7 ("This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.").

Courts of appeals before *Dimaya* likewise understood the simple, plain meaning of "by its nature" to call for a categorical approach. As the Fifth Circuit aptly summarized, "the phrase 'by its nature' compels a categorical approach to determining whether an offense is a crime of violence under Section 16(b) . . . . The reason is clear: either a crime is violent 'by its nature' or it is not. It cannot be a crime of violence 'by its nature' in some cases, but not others, depending on the circumstances." *United States* v. *Velazquez-Overa*, 100 F.3d 418, 420–21 (5th Cir. 1996); see also *United States* v. *McGuire*, 706 F.3d 1333, 1336–37 (11th Cir. 2013) (similar); *United States* v. *Venegas-Ornelas*, 348 F.3d 1273, 1276 (10th Cir. 2003) (simi-

lar); *Sareang Ye* v. *I.N.S.*, 214 F.3d 1128, 1133 (9th Cir. 2000) (similar). These consistent interpretations lead to one conclusion: the residual clause "tells courts to figure out what an offense normally—or . . . 'ordinarily'—entails, not what happened to occur on one occasion." *Dimaya*, 138 S. Ct. at 1217–18 (plurality opinion).

Indeed, it is difficult to understand what role the phrase "by its nature" might play in the statute if not to demand the categorical approach. It is not at all clear how a court asked to decide whether the *facts* of an offense create the risk of force would approach its job differently than one asked to make the same determination based on *"the nature"* of those particular facts. By contrast, Respondents' interpretation—and the interpretation of every court to confront that language before *Dimaya*—gives the phrase a clear function: "the nature" of an offense is its statutory elements. Requiring that it pose a risk of force "by its nature" requires that it examine the elements of the statute, not the particular facts. Respondents' position—but not the government's—thus "avoid[s] a reading which renders [these] words altogether redundant." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995).

This reading is bolstered by the role of the term "offense" in the residual clause. "Offense" makes two appearances in § 924(c)(3): First, as a global term that is distributed across both the elements clause and the residual clause ("an offense that is a felony"); and second, as a stand-alone term in the residual clause ("in the course of committing the offense"). It is undisputed that the global term "offense," as distributed across both clauses, refers to the criminal violation generically rather than the facts of the case. But the government overlooks that it is *this* use of "of-

fense"—which is undisputedly categorical—to which the phrase "by its nature" attaches. In other words, the statute uses "by its nature," which refers to things that "always have [a given] characteristic," to refer back to the generic "offense that is a felony." All of this shows that the statute calls for a categorical inquiry.

The Court's precedents interpreting materially indistinguishable language in § 16(b) support the same reading. *Leocal* emphasized § 16(b)'s use of the phrase "by its nature" in concluding that "the statute directs our focus to the 'offense' of conviction . . . rather than to the particular facts relating to [the defendant's] crime." 543 U.S. at 7. And *Dimaya* again explained that § 16(b)'s text—which is materially identical to § 924(c)'s residual clause—"creates no draw: Best read, it demands a categorical approach." 138 S. Ct. at 1217 (plurality opinion). As the Court explained, the phrase "by its nature" supports a categorical interpretation, *id.*, and terms such as "conviction," "felony," and "offense" "are 'read naturally' to denote the 'crime as *generally* committed,'" *id.* (quoting *Nijhawan* v. *Holder*, 557 U.S. 29, 34 (2009)).

Because the § 924(c) residual clause's language is materially identical to § 16(b)'s, this Court should follow the same construction for the same textual reasons. To hold otherwise would be to assume that Congress intended the same language, as used in provisions serving very similar purposes, to be read in fundamentally different ways. There is no textual indication that Congress intended that anomalous result.

B. Section 924(c)'s legislative history shows that it was intended to be applied the same way as § 16.

Section 924(c)'s legislative history shows that Congress intended courts to use the categorical approach. Section 924(c) was initially enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968). The section imposed a mandatory minimum sentence for the use or carrying of a firearm in the commission of a felony. See *id.* § 102, 82 Stat. at 1223–24.

In 1984, Congress amended § 924(c) to abrogate *Simpson* v. *United States*, 435 U.S. 6 (1978), and *Busic* v. *United States*, 446 U.S. 398 (1980), which had in Congress's view "greatly reduced [the statute's] effectiveness as a deterrent to violent crime." S. Rep. No. 98-225, at 312 (1983). In keeping with the categorical approach, the Senate Report said that § 924(c) is targeted to reach specific *statutes* that "are precisely the type of extremely dangerous offenses for which a mandatory punishment for the use of a firearm is the most appropriate." *Id.*

However, the 1984 Amendment did not explicitly define "crime of violence" for § 924(c)'s purposes. Rather, Congress relied on the general definition of "crime of violence" found in § 16. *Id.* at 307 ("[T]he phrase is commonly used throughout the bill, and accordingly the Committee has chosen to define it for general application in title 18.") (footnote omitted); *id.* at 389 n.7 ("The term 'crime of violence' is defined in 18 U.S.C. 16 . . . ."); *id.* at 316 n.3 (similar); *id.* at 313 n.9 (similar). Under § 16's general definition, "crime of violence" meant "an offense . . . that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any felony that, by its nature, involves the

substantial risk that physical force against another person or property may be used in the course of its commission." *Id.* at 307.

Finally, in 1986, Congress amended § 924(c) to explicitly define "crime of violence"—using the same language as § 16. See Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(F), 100 Stat. 449, 457 (1986); S. Rep. No. 98-583, at 22 (1984) (noting the "amendment to Section 924(c) which, with some modifications, incorporates virtually verbatim the language from . . . the Comprehensive Crime Control Act of 1984"). Thus, § 924(c)'s "crime of violence" definition grew out of § 16's definition of the same term. This history, together with the close linguistic parallels, shows that § 924(c)(3) must be construed—like § 16—to require the categorical approach.

C. Congress has acquiesced in the court of appeals' long-standing and consistent application of the categorical approach under § 924(c).

In the nearly thirty years since this Court created the categorical approach in *Taylor*, the overwhelming majority of circuits have followed the Court's lead by applying the categorical approach under § 924(c). See, *e.g.*, *United States* v. *Taylor*, 814 F.3d 340, 378 (6th Cir. 2016) (observing that the § 924(c) residual clause "requires the application of a categorical approach"), *cert. denied*, 138 S. Ct. 1975 (2018); *United States* v. *Amparo*, 68 F.3d 1222, 1224 (9th Cir. 1995) (applying "a categorical approach to determining which offenses are included under section 924(c) as 'crimes of violence'"); *United States* v. *Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (holding that the text of the § 924(c) residual clause requires a categorical approach), *abrogation recognized by United States* v. *Torres-Villalobos*, 487 F.3d 607 (8th Cir. 2007). Prior to *Ovalles*, the

Second and Eleventh Circuits likewise applied the categorical approach to both the residual and elements clauses of § 924(c) without qualification. See *United States* v. *Hill*, 890 F.3d 51, 55 (2d Cir. 2018) (explaining that "the categorical approach is '"not only consistent with both precedent and sound policy' but [] also . . . 'necessary in view of the language of [§ 924(c)]'" (first alteration in original)); *McGuire*, 706 F.3d at 1336–37 (applying the categorical approach to both clauses).

Congress, meanwhile, has been notably silent on the courts of appeals' widespread adoption of the categorical approach, despite a demonstrated willingness over the same period of time to take swift corrective action in the wake of what it views as problematic judicial decisions involving § 924(c).

For example, in 1984, Congress wasted little time in amending § 924(c)(1) in direct response to *Simpson* and *Busic*. See *supra* § IV.B. That vigilance was once again on display in 1998, when Congress approved the "Bailey Fix Act," see 144 Cong. Rec. 26608 (1998), in direct response to a series of decisions in which the Court wrestled with the meaning of the terms "use" and "carry" in § 924(c)(1). *E.g.*, *Bailey* v. *United States*, 516 U.S. 137 (1995), *superseded by statute as recognized in Welch* v. *United States*, 136 S. Ct. 1257 (2016). Unhappy with the limiting effect of these decisions, Congress responded by making it an offense under § 924(c)(1) to "posses[s]" a firearm "in furtherance of" one of the predicate offenses and adding sentencing enhancements for brandishing and discharge. See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998).

Since that time, Congress has continued to amend § 924(c) to expand, refine, or clarify its terms. *E.g.*, Protection of Lawful Commerce in Arms Act, Pub. L.

No. 109-92, § 6(b), 119 Stat. 2095, 2102 (2005); Act of Oct. 6, 2006, Pub. L. No. 109-304, § 17(d)(3), 120 Stat. 1485, 1707 (2006). Yet, despite the fact that Congress has repeatedly and substantially revised § 924(c)—including in response to the federal courts' construction of it—not once have lawmakers responded to the circuits' continued application of the categorical approach in cases dating back decades.

In light of the circuits' consistent, long-term, and nearly universal application of the categorical approach—and Congress's demonstrated willingness to overturn interpretations of § 924(c) it disagrees with—congressional silence on the issue speaks volumes. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 599 (1983) (finding that "Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence.").

D. The doctrine of constitutional avoidance does not permit a conduct-based interpretation of § 924(c).

The petition relies heavily on "the principle of constitutional avoidance." Pet. 20. This argument did not prevail in *Johnson*, 135 S. Ct. at 2562, or *Dimaya*, 138 S. Ct. at 1217, and it cannot do so here.

The avoidance canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005). "[A] court relying on that canon still must *interpret* the statute, not rewrite it." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018). Here, Section 924(c)'s text unambiguously requires a categorical

approach. The "upshot of all [the] textual evidence" discussed above is that § 924(c)'s residual clause—like the clauses in § 16(b) and the ACCA—"has no 'plausible' fact-based reading." *Dimaya*, 138 S. Ct. at 1218 (plurality opinion); see *Johnson*, 135 S. Ct. at 2562; *supra* § IV.A. Thus, "[i]n the absence of more than one plausible construction, the canon simply 'has no application.'" *Jennings*, 138 S. Ct. at 842.

The government's effort to show otherwise falls flat. In particular, it would make no sense to use the phrase "by its nature" to refer to the facts of a defendant's actual underlying conduct. Contra Pet. 16. A single discrete criminal act has no "fundamental quality"—or in Justice Gorsuch's term, no "inevitable characteristic"—that "distinguishes [it] from another" example of the same crime. See *supra* p. 15. Indeed, the government's reading of the statute would be exactly the same if the words "by its nature" were simply omitted: "[A]n offense that is a felony and . . . that . . . involves a substantial risk . . . ." A construction that would render some of the clause's language "inoperative or superfluous" is not a plausible one. See *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004).

Nor does the government find support in the standalone use of "offense" in the § 924(c) residual clause. See Pet. 13–14. Even if the word "offense" can, in a vacuum, refer either to a generic criminal violation or to a defendant's specific acts, see *id.*, it cannot do so here. Clause (c)(3)(B)'s language—"in the course of committing *the offense*"—refers back to the generic "offense that is a felony." "The use of the definite article means an [offense] specifically provided for" in the statutory text. See *Work* v. *United States ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200, 208 (1923). The only "offense" previously provided for in this subsection is the generic felony that applies to

both the elements clause and the residual clause. Thus, the phrase "the offense" in the residual clause—like "by its nature"—refers back to the generic use of "offense" in § 924(c)(3)'s introductory phrase.

Given all of this, there is no way for the word "offense" to carry a "case-specific meaning" in the residual clause. Pet. 14. The government's argument could prevail only if the very same use of the term "offense" in § 924(c)(3) meant one thing for purposes of the elements clause, but something different for purposes of the residual clause. But statutory language cannot change on a case-by-case basis—not even to avoid constitutional concerns. See *Clark*, 543 U.S. at 382 (rejecting a "novel interpretive approach . . . which would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case").

Finally, the government's position would give the § 924(c) residual clause a different meaning from the nearly identical language in § 16, which this Court has unanimously read to refer to "the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal*, 543 U.S. at 7; see also *id.* at 10. The Court confirmed the unambiguous nature of this language last Term in *Dimaya*, explaining that "the avoidance canon cannot serve . . . as the interpretive tie breaker" because § 16's language "demands a categorical approach." 138 S. Ct. at 1217 (plurality opinion). So too in *Johnson*, which rejected the avoidance argument because "'[t]he only plausible interpretation' of the [ACCA residual clause] . . . requires use of the categorical approach." 135 S. Ct. at 2562. Section 924(c)'s materially indistinguishable language requires the same result. There is no "competing

plausible interpretation[ ]" here. See *Clark*, 543 U.S. at 381–82.

E. Under the categorical approach, the § 924 residual clause suffers from the same fundamental defects as the ACCA residual clause and § 16(b).

Properly construed, the § 924(c) residual clause suffers from the same constitutional defects as the ACCA residual clause and § 16(b). All of these residual clauses "leave[] grave uncertainty about how to estimate the risk posed by a crime," offering "no reliable way to choose between . . . competing accounts" of what the ordinary case of the crime at issue may entail. *Johnson*, 135 S. Ct. at 2557–58. They further "leave[] uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. Section 924(c)'s definition of "crime of violence," then, "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

In *Dimaya*, this Court held that § 16(b)'s validity was "straightforward[ly]" resolved by *Johnson*. 138 S. Ct. at 1213 (plurality opinion). This was so because *Johnson*'s two-part reasoning applied equally to both residual clauses. *Id.* at 1216 (plurality opinion). Just as *Dimaya* was a straightforward application of *Johnson*, this case is a straightforward application of both *Johnson* and *Dimaya*.

Like its corollaries in the ACCA and § 16(b), the § 924(c) residual clause requires courts to assess the risk of the use of physical force by imagining what the "ordinary case" of a candidate for a "crime of violence" might be, but provides "no guidance on how to figure out what that ordinary case" constitutes. *Dimaya*, 138 S. Ct. at 1207–08. A judge is left to her own imagination in constructing the "ordinary case";

under the § 924(c) residual clause there could therefore be as many "ordinary cases" of the same crime as there are federal judges, and the statute provides no way to distinguish among them. See *Johnson*, 135 S. Ct. at 2558. The text of § 924(c)'s residual clause is exactly the same as the text of § 16(b) that was invalidated in *Dimaya*, see 138 S. Ct. at 1223 (plurality opinion), and is thus equally "speculative" and indeterminate, see *id.* at 1214.

The uncertainty of the "ordinary case" analysis is only exacerbated by the statute's fuzzy "substantial risk" standard, which provides no meaningful threshold for the quantum of risk needed to constitute a "crime of violence." Though the use of an imprecise qualitative standard such as "substantial risk" is not in itself unconstitutional, *Johnson* and *Dimaya* held that it *becomes* unconstitutional when a statute requires that it be applied "to an idealized ordinary case of the crime." *Dimaya*, 138 S. Ct. at 1214 (plurality opinion). The underlying indeterminacy of the "ordinary case" determination, plus the uncertainty of what constitutes "substantial risk," together make the § 924(c) residual clause so vague as to violate due process. See *id.* 1214–15.

In his concurrence in *Dimaya*, Justice Gorsuch wrote that § 16(b) "isn't your everyday ambiguous statute. It leaves the people to guess about what the law demands—and leaves judges to make it up. . . . Will, not judgment, dictates the result." *Dimaya*, 138 S. Ct. at 1232 (Gorsuch, J., concurring). The § 924(c) residual clause—containing the same language as § 16(b)—suffers from the same fatal flaws. The decision below was correct. Pet. App. 5a–6a.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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No. 18-431

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In the decision below, the court of appeals struck down the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) as "unconstitutionally vague." Pet. App. 5a. As a result, conviction of a commonly charged federal crime is now plain constitutional error in the Fifth Circuit. See *United States* v. *Lewis*, 907 F.3d 891, 894-895 (2018). The compelling separation-of-powers rationale for this Court's traditional practice of reviewing a lower-court decision that invalidates a federal statute, see Pet. 21-22, is magnified here by the abundance of important criminal prosecutions—both pending and final—in which the question presented is at issue. The high volume of litigation has produced a widespread, intractable, and growing circuit conflict in only a matter of months. See Pet. 22-24. Respondents offer no sound reason for the Court to nevertheless delay resolution of the question presented by passing up review of the decision below, which squarely and unqualifiedly holds Section 924(c)(3)(B)

to be unconstitutional. This Court should grant the petition for a writ of certiorari and decide this Term whether the Constitution in fact requires Section 924(c)(3)(B)'s invalidation.

A. This Court Should Grant Review In This Case To Address Section 924(c)(3)(B)'s Constitutionality

Respondents do not meaningfully contest that the question presented warrants this Court's review in an appropriate case. This is such a case. Indeed, it is the best case for allowing the full Court to provide the issue with the expeditious resolution that it needs. See Pet. 25-26.

1. This Court's conclusion that 18 U.S.C. 16(b)'s definition of "crime of violence" was unconstitutionally vague in *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), has "call[ed] into question" the many prosecutions that the government has conducted, is conducting, and would in the future conduct in reliance on the similarly worded Section 924(c)(3)(B), *id.* at 1241 (Roberts, C.J., dissenting). Since Section 924(c)(3)(B)'s enactment in 1986, prosecutors have frequently relied on it to prosecute some of the most serious violent offenders in the federal system. Pet. 24. Contrary to respondents' assertion (Br. in Opp. 13)* that the constitutional issue here "pertains only to a tiny fraction of 924(c) prosecutions," many Section 924(c) prosecutions involve manifestly violent conduct that does not technically fit Section 924(c)(3)(A)—including respondents' own conspiracy to rob multiple convenience stores with a short-barreled shotgun. Pet. 4-5; see Pet. 24-25 (collecting additional examples involving firebombing and kidnapping).

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* The briefs in opposition in this case are substantially identical; citations refer to Davis's brief in opposition.

The rapid nationwide proliferation of litigation on Section 924(c)(3)(B)'s constitutionality, which has resulted in divergent outcomes, illustrates beyond doubt that the question presented here is recurring and important. Even though the petition for a writ of certiorari in this case was filed a mere five months after *Dimaya*, four circuits had already addressed—and reached different conclusions on—whether Section 924(c)(3)(B) is invalid in light of that decision. Pet. 21-23; see Pet. App. 5a (invalidating Section 924(c)(3)(B)); *United States* v. *Salas*, 889 F.3d 681, 683 (10th Cir. 2018) (same), petition for cert. pending, No. 18-428 (filed Oct. 3, 2018); *United States* v. *Eshetu*, 898 F.3d 36, 37-38 (D.C. Cir. 2018) (per curiam) (same), petition for reh'g pending, No. 15-3020 (D.C. Cir. filed Aug. 31, 2018); see also *United States* v. *Barrett*, 903 F.3d 166, 182 (2d Cir. 2018) (upholding Section 924(c)(3)(B)), petition for cert. pending, No. 18-6985 (filed Dec. 3, 2018). Since the filing of the petition, two more circuits have addressed the question, and both have held—in conflict with the decision below—that Section 924(c)(3)(B) is constitutionally valid.

In *Ovalles* v. *United States*, the en banc Eleventh Circuit determined that Section 924(c)(3)(B) invites no constitutional vagueness concerns because it "prescribes a conduct-based approach, pursuant to which the crime-of-violence determination should be made by reference to the actual facts and circumstances underlying a defendant's offense." 905 F.3d 1231, 1234 (2018). After reviewing this Court's decisions applying the "categorical approach" and culminating in *Dimaya*, see *id.* at 1240-1244, the Eleventh Circuit reasoned that the considerations motivating that approach do not "likewise compel a categorical interpretation of [Section]

924(c)(3)(B)," which instead "can at the very least plausibly be read to bear a conduct-based interpretation." *Id.* at 1244; see *id.* at 1244-1251; see also *id.* at 1253 (W. Pryor, J., concurring) ("How did we ever reach the point where this [c]ourt, sitting en banc, must debate whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort fired an AK-47 at her family is a crime of violence? It's nuts.").

Similarly, in *United States* v. *Douglas*, the First Circuit determined that Section 924(c)(3)(B) is not "void for vagueness * * * because the statute reasonably allows for a case-specific approach, considering real-world conduct." 907 F.3d 1, 3 (2018). In doing so, the First Circuit contrasted its decision with the Fifth Circuit's decision in this case. See *id.* at 13. The First Circuit also rejected the same textual argument concerning the phrase "by its nature" that respondents advance here, *id.* at 11, and observed that the categorical approach was "fashioned and refined * * * for practical and constitutional reasons that are specific to the consideration of a prior conviction" and that "do not exist in the distinct context of [Section] 924(c)(3)(B)," *id.* at 13. And the court found that the Hobbs Act robbery conspiracy to which the defendant there pleaded guilty was a crime of violence. See *id.* at 17 (explaining that the conspirators "forced several victims around the house and outside with guns pressed against their heads, threatened to kill a victim multiple times[,] and beat all three victims with a crowbar").

The circuit conflict is unlikely to go away on its own; all indications are that it will instead continue to grow. The issue is currently pending in nearly every other court of appeals, and will soon be pending everywhere. See *United States* v. *Jenkins*, No. 14-2898 (7th Cir. argued

Nov. 2, 2018); *United States* v. *Sims*, No. 15-4640 (4th Cir. argued en banc Sept. 26, 2018); *Knight* v. *United States*, No. 17-6370 (6th Cir. filed Nov. 20, 2017); *United States* v. *McArthur*, No. 17-2300 (8th Cir. filed June 13, 2017); *United States* v. *Begay*, No. 14-10080 (9th Cir. filed Feb. 20, 2014). The Tenth Circuit has already cemented its view that Section 924(c)(3)(B) is unconstitutional by denying en banc review. See Pet. 23-24; see also Gov't Reply Br. at 2-3, *United States* v. *Salas*, No. 18-428 (Dec. 19, 2018) (describing the Tenth Circuit's denial of en banc rehearing and its subsequent decisions treating Section 924(c)(3)(B) as unconstitutional). Contrary to respondents' suggestion (Br. in Opp. 12-13), the government should not have to litigate this question in every circuit, and seek en banc review multiple times in the same circuit, before it can obtain this Court's review of the constitutionality of a frequently invoked and important federal criminal law. The continued confusion in the lower courts—which affects not only current and future prosecutions but ones that are already final as well, see Pet. 24—warrants this Court's immediate intervention.

2. Respondents do not identify any case aside from this one that would give this Court a similarly good opportunity to resolve the question presented this Term. They instead suggest (Br. in Opp. 1-14) that the Court should allow the issue to fester in the lower courts for another year, on the theory that the issue of Section 924(c)(3)(B)'s constitutionality is not squarely presented here. That suggestion is unsound.

a. The court of appeals' only basis for vacating respondents' Section 924(c) convictions was its conclusion that Section 924(c)(3)(B) is unconstitutional. Pet. App. 5a. Were this Court to grant the petition and reverse

that holding, the court of appeals' directive to permanently vacate those convictions, see *id.* at 6a, could not stand. The indictment in this case properly alleged all the elements of a Section 924(c) violation. See Indictment 5 (Count Two); cf. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999) (elements of a Section 924(c) violation). If, as the government contends and three circuits have held, Section 924(c)(3)(B) employs a case-specific approach in which the jury determines whether the defendant's offense conduct meets the statutory definition, then the only error in this case was a misinstruction of the jury. Such an error would not preclude conviction.

Because omission of an element of the crime from the jury instructions is not structural error, see *Neder* v. *United States*, 527 U.S. 1, 17-19 (1999), respondents would at most be entitled to a new trial. And they would not be entitled even to that, because any error was harmless. The evidence overwhelmingly demonstrates that respondents' conspiracy to rob multiple convenience stores by threatening employees with a short-barreled shotgun "involve[d] a substantial risk that physical force against the person or property of another may be used," 18 U.S.C. 924(c)(3)(B); see Pet. 25-26. Even if the evidence permitted another conclusion, however, the court of appeals' decision, which requires vacatur with no possibility of a new trial, would lack justification if its constitutional holding is wrong.

b. Respondents' assertion of "invited error" (Br. in Opp. 4-8) by the government is mistaken. As the petition acknowledges (Pet. 8, 10), the government had argued before *Dimaya*, in this and other cases, that Section 924(c)(3)(B) should be interpreted to incorporate a categorical approach like Section 16(b)'s. *Dimaya* held

Section 16(b) to be unconstitutionally vague under such an interpretation, with both the plurality and the concurrence attaching significance to the absence of any argument by the government for a different interpretation. See 138 S. Ct. at 1217 (opinion of Kagan, J.); *id.* at 1232-1233 (Gorsuch, J., concurring in part and concurring in the judgment). Accordingly, after *Dimaya*, the government reconsidered whether Section 924(c)(3)(B) should in fact be construed to adopt the categorical approach at issue in *Dimaya*. The government promptly informed this Court of its changed position in a supplemental brief addressing two cases in which it had sought certiorari from pre-*Dimaya* decisions of the Seventh Circuit holding Section 924(c)(3)(B) unconstitutional. See Gov't Supp. Br. at 2-4, *United States* v. *Jenkins*, Nos. 17-97 and 17-651 (Apr. 19, 2018). This Court granted the government's petitions in those cases, vacated the decisions below, and remanded for further consideration in light of *Dimaya*. *United States* v. *Jenkins*, 138 S. Ct. 1980 (2018) (No. 17-97); *United States* v. *Jackson*, 138 S. Ct. 1983 (2018) (No. 17-651).

The Court similarly remanded respondents' petitions in these cases, which also presented the issue of Section 924(c)(3)(B)'s constitutionality. See Pet. 6-10. On remand, the government presented the court of appeals with its current construction of Section 924(c)(3)(B), and the court rejected it, without suggesting that the government had failed to preserve it. Indeed, none of the many courts of appeals to have addressed the question presented has found the government's current construction to be foreclosed on forfeiture or waiver grounds. See, *e.g.*, *Douglas*, 907 F.3d at 7-8 (rejecting waiver argument similar to respondents' and observing that *Dimaya* "shifted the relevant legal landscape" and

that the "government has been forthright about its changed position and the reasons underlying this change"). And if the government's post-*Dimaya* reconsideration of Section 924(c)(3)(B) were preclusive of this Court's review, it would preclude review of *any* case in which the issue arose in the district court pre-*Dimaya*. No sound reason exists to delay, potentially for years, this Court's resolution of a critically important question based on an unsound procedural argument that no appellate court has viewed as an obstacle to merits review.

c. Respondents' pending petitions for rehearing on issues "unrelated to the constitutionality" of Section 924(c)(3)(B) (Br. in Opp. 13) are likewise not a reason to deny certiorari. Irrespective of when or how respondents' petitions for rehearing are resolved, those rehearing petitions have no bearing on this Court's power to review the judgment below. See 28 U.S.C. 1254(1) (certiorari jurisdiction over "[c]ases in the courts of appeals"). Nor, as respondents acknowledge (Br. in Opp. 13), does the substance of those rehearing petitions have any bearing on this Court's review of the merits of the question presented. The only issue presented in the rehearing petitions that relates to Section 924(c)(3)(B) is the scope of a remand in the event that respondents' Section 924(c)(3) convictions are permanently vacated. See *ibid.* If this Court agrees with the court of appeals that such vacatur is required, then either this Court or the court of appeals can address any potential issues about the scope of further proceedings. And if this Court determines that Section 924(c)(3)(B) is constitutional, any lingering dispute about the scope of further proceedings following the current court of appeals decision will become moot.

B. The Court Of Appeals Erred In Invalidating Section 924(c)(3)(B)

As the petition explains (Pet. 12-21), the decision below is incorrect. Section 924(c)(3)(B) defines "crime of violence," for purposes of Section 924(c)'s prohibition on firearms in such crimes, to include any "offense that is a felony * * * that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). Respondents do not dispute that, if that definition is construed to refer to the actual conduct underlying the Section 924(c) prosecution, it is fully constitutional. See Pet. 12. Their defense of the court of appeals' decision to adopt a contrary construction, under which the statute would be invalid, largely repeats that court's errors.

1. Nothing in the text of Section 924(c)(3)(B) itself requires—or would, as a matter of first principles, suggest—that the definition turns on a court's imagining the "ordinary case" of a crime. Respondents focus (Br. in Opp. 14-15) on the phrase "by its nature," but that phrase is naturally read to refer to the nature of the "offender's actual underlying conduct." *Dimaya*, 138 S. Ct. at 1254 (Thomas, J., dissenting); see *Ovalles*, 905 F.3d at 1247 (recognizing that the phrase can refer to the nature of "particular acts" by the defendant); *Barrett*, 903 F.3d at 182 (similar); Pet. 15-16. It limits the inquiry to the offense conduct itself—here, conspiracy to rob a series of convenience stores at gunpoint—rather than the characteristics of the offender. A defendant's self-proclaimed unwillingness to shoot someone does not make a gunpoint robbery nonviolent, cf. Br. in Opp. 10; by the same token, a defendant's history

of assaulting insurance adjusters does not make the fraudulent submission of an insurance claim violent.

Nor is the ordinary-case approach compelled by the term "offense." Br. in Opp. 16-17. This Court has already recognized that the term "offense" can have a case-specific meaning. See Pet. 13-14 (discussing *Nijhawan* v. *Holder*, 557 U.S. 29 (2009), and *United States* v. *Hayes*, 555 U.S. 415 (2009)). That is its most natural meaning in the context of Section 924(c)(3)(B), which refers to "the course of committing the offense." And, contrary to respondents' contention (Br. in Opp. 23), the previous statutory reference to "offense" can be understood the same way. Because the case-specific meaning of the term "offense" encompasses *both* the defendant's acts *and* the law he transgressed, Section 924(c)(3) can define "an offense" as a "crime of violence" when it either has particular conduct "as an element" *or* is "committ[ed]" in a particular way.

2. Unlike the "crime of violence" definition in Section 16(b) that the Court considered in *Dimaya*, Section 924(c)(3)(B) is relevant to the classification only of conduct underlying the current criminal prosecution, and not to prior convictions whose facts may be difficult, or constitutionally problematic, to discern. That "crucial distinction," *Douglas*, 907 F.3d at 13, means that neither practical nor constitutional concerns counsel in favor of an ordinary-case approach, see *id.* at 14; *Ovalles*, 905 F.3d at 1249-1250; *Barrett*, 903 F.3d at 181-182. To the contrary, in the particular context of Section 924(c)(3)(B), the canon of constitutional avoidance favors a case-specific approach. See Pet. 19-21.

Before *Dimaya*, it was reasonable to presume, as the government itself did, that Section 924(c)(3)(B) should be interpreted congruently with Section 16(b). But that

assumption should not result in the invalidation of the statute. If anything, by enacting a subsection-specific definition of "crime of violence" in Section 924(c)(3) rather than relying on the definition in Section 16(b), Congress signaled that the statutes need not be read identically. Respondents identify nothing in the legislative history (Br. in Opp. 18-19) or congressional silence (*id.* at 19-21) to indicate that Congress in 1986 specifically intended Section 924(c)(3)(B) to adopt the ordinary-case categorical approach. See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(F), 100 Stat. 457. This Court did not embrace the categorical approach for any purpose until 1990, see *Taylor* v. *United States*, 495 U.S. 575, 600-602; did not embrace an ordinary-case categorical approach until 2007, see *James* v. *United States*, 550 U.S. 192, 208, overruled by *Johnson* v. *United States*, 135 S. Ct. 2551 (2015); and has never embraced any form of the statutory categorical approach outside the context of a statute that can be applied to classify prior convictions. Particularly now that *Dimaya* has invalidated a statute in light of that approach, Congress cannot be presumed to have desired it.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2018

No. 18-431

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the subsection-specific definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using, or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally vague.

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In the Supreme Court of the United States

No. 18-431

UNITED STATES OF AMERICA, PETITIONER

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 903 F.3d 483. A prior opinion of the court of appeals (Pet. App. 10a-17a) is not published in the Federal Reporter but is reprinted at 677 Fed. Appx. 933.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2018. The petition for a writ of certiorari was filed on October 3, 2018. The petition for a writ of certiorari was granted on January 4, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924 (2012) provides in pertinent part:

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

* * * * *

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

* * * * *

Other pertinent constitutional and statutory provisions are reproduced in the appendix to this brief. See App., *infra*, 1a-8a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, respondents Maurice Davis and Andre Glover were each convicted on one count of conspiracy to commit robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a); multiple counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; and two counts of brandishing a short-barreled shotgun during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(B)(i), 2, and 18 U.S.C. 924(c)(1)(C)(i) (2012). C.A. ROA (ROA) 269; Davis Am. Judgment 1. The district court sentenced Glover to 498 months of imprisonment, to be followed by two years of supervised release, and it sentenced Davis to 608 months of imprisonment, to be followed by two years of supervised release. ROA 270; Davis Am. Judgment 2. The court of appeals affirmed. Pet. App. 10a-17a. This Court granted respondents' petitions for writs of certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). Pet. App. 1a-2a. On remand, the court of appeals vacated one Section 924(c) conviction as to each respondent and remanded the case to the district court. *Id.* at 1a-9a.

A. Respondents' Offense Conduct

1. Respondents conspired to commit a string of armed robberies of convenience stores in and around Dallas, Texas. See Gov't C.A. Br. 2-10 (summarizing trial evidence); Gov't Second Supp. C.A. Letter Br. 24

(same). Each robbery followed a similar pattern: two people—usually wearing red or green bandanas over their faces—would arrive at the targeted store in a gold SUV with no license plates; one would point a short-barreled shotgun at an employee and issue orders; and the robbers would take cigarettes and demand money. See *ibid.*

The first robbery occurred at about 3 a.m. on June 16, 2014, at a convenience store in Lancaster, Texas. ROA 645-654. One of the robbers grabbed the store's assistant manager, Andrea Douglas, from behind, put a short-barreled shotgun to her side, and asked if she had a "money bag." ROA 654; see ROA 644-645, 653. When Douglas explained that she could not open the store's safe, the robber ordered her to take him to a storage room and forced her to lie face down on the floor. ROA 654, 657. Douglas "was doing a lot of crying," and the robber told her that "he was going to hurt [her] if [she] didn't be quiet." ROA 657. The second robber then entered the storage room, and both robbers filled bags with cartons of cigarettes. ROA 656-657, 660. When they were done, one of the robbers told Douglas to wait 30 seconds before calling the police or he would kill her. ROA 662.

The second robbery occurred at about 2:30 a.m. on June 21, 2014, at a convenience store in Dallas. ROA 686-687, 690-691, 699. Two robbers drove up in the gold SUV and accosted Tomitha Hardge, a store employee who was standing outside. ROA 685-686, 690-691; Gov't C.A. Br. 4. One of the robbers pointed a short-barreled shotgun in Hardge's face; when she screamed, he ordered her to be quiet. ROA 691-692; Gov't C.A. Br. 4. The robber then forced Hardge to let him into the store's storage room, where he filled a gray plastic tub with

cartons of cigarettes. ROA 692-695. After loading the tub into the SUV, the robber instructed Hardge to open the store's safe. ROA 696. Hardge replied that she did not have access to the safe, at which point a passenger in the SUV—whom Hardge did not see but believed to be a woman—said, "Come on. Let's go." *Ibid.* The robber holding the shotgun then turned to Hardge and said, "Bitch, you better not snitch," before driving away. ROA 697.

The third robbery occurred on June 22, 2014. ROA 433. At about 7 a.m., a gold SUV pulled up to a convenience store in Mansfield, Texas. ROA 433-438; Gov't C.A. Br. 5. One of the robbers got out, pointed a short-barreled shotgun at an employee, Olivia Gaytan, and ordered her to go into the store's storage room. ROA 432-433, 438-439. A second robber followed Gaytan into the storage room and filled a gray plastic tub with cartons of cigarettes. ROA 439-442. One of the robbers then demanded that Gaytan open the safe. ROA 442. The robbers left after Gaytan informed them that the safe had a time lock and could not be opened for another hour. ROA 442, 444.

The fourth robbery occurred about 30 minutes later, when the same robbers did basically the same thing at another convenience store in Midlothian, Texas. ROA 462-463, 465, 722; Gov't C.A. Br. 6. One of the robbers entered the store and pointed a short-barreled shotgun at an employee, Kathy Oakley. ROA 462-463, 465, 469. Oakley begged the robber not to hurt her, and the robber said he would not do so if Oakley complied with his instructions. ROA 469. As the first robber held Oakley at gunpoint, the second robber entered the store with a gray plastic tub and filled it with cartons of cigarettes. ROA 470-471, 474. The robbers also stole a bank deposit

bag and money from an open safe. ROA 473-474; see ROA 465-466.

2. Shortly after the fourth robbery, law-enforcement agencies broadcast a lookout describing the robbers and their gold SUV. ROA 501-505. Officers spotted respondents, who matched the robbers' descriptions, in a gold SUV, and attempted to stop them at a McDonald's drive-through. ROA 504-507. When an officer, with his weapon drawn, ordered respondents to show their hands, respondents fled. ROA 507. A chase ensued, with speeds reaching 85 to 95 miles per hour in "[e]xtremely dangerous and wet" conditions. ROA 541; see ROA 509-510. After about two miles, respondents crashed the SUV into a concrete ditch and fled on foot, leaving behind a trail of cash. ROA 510-513.

Officers quickly caught Glover, ROA 516-518, and later discovered Davis hiding in bushes and sitting atop a pile of cash, ROA 518-519. Inside the SUV, officers found numerous cartons of cigarettes, a gray plastic tub, a loaded short-barreled shotgun, several shotgun shells, the bank deposit bag with cash from the fourth robbery, and articles of clothing that matched items worn by the robbers. ROA 571, 576-579, 585-590, 592-599. Davis later admitted his involvement in the third and fourth robberies but claimed that "[an]other person" had carried the gun. ROA 634; see ROA 630, 633-636. Glover declined to make any statements about the robberies. ROA 636.

B. Respondents' Criminal Prosecution

A federal grand jury indicted respondents on one count of conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); three counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; and two counts of brandishing a short-barreled shotgun

during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(B)(i), 2, and 18 U.S.C. 924(c)(1)(C)(i) (2012). ROA 13-18, 20-22. Glover was charged with an additional count of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2, and Davis was charged with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). ROA 19, 23.

Before trial, respondents moved to dismiss the Section 924(c) counts. See ROA 87-95. Section 924(c) makes it a crime to "use[] or carr[y]" a firearm "during and in relation to," or to "possess[]" a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). The statute contains its own specific definition of "crime of violence," which is applicable only "[f]or purposes of this subsection." 18 U.S.C. 924(c)(3). The definition covers any federal "offense that is a felony" and satisfies the criteria set forth in either 18 U.S.C. 924(c)(3)(A) or (B). 18 U.S.C. 924(c)(3). An offense satisfies Section 924(c)(3)(A) if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Section 924(c)(3)(B) alternatively includes any offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B).

Respondents contended that the underlying offenses identified in their Section 924(c) charges—their Hobbs Act robberies and their conspiracy to commit Hobbs Act robbery, ROA 17, 22—did not qualify as crimes of violence, see ROA 87-94. They took the view that those offenses did not satisfy Section 924(c)(3)(A) and that Section 924(c)(3)(B) was unconstitutionally vague in light of this Court's decision in *Johnson* v. *United States*,

135 S. Ct. 2551 (2015). See ROA 87-94. In *Johnson*, the Court had invalidated on vagueness grounds the residual clause in the sentence-enhancement provisions of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), which classifies a prior conviction as a "violent felony" if it was for a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." See 135 S. Ct. at 2555, 2560.

The district court denied respondents' motion, Pet. App. 19a, 22a, and the case proceeded to trial. The jury found Glover guilty on all counts and Davis guilty on all counts except one Hobbs Act robbery count. ROA 1368-1370. For the Section 924(c) charges, the jury made special findings that respondents brandished (or aided and abetted the brandishing of) a short-barreled shotgun during each crime of violence. *Ibid.*; see 18 U.S.C. 924(c)(1)(A)(ii) and (B)(i) (enhanced penalties for brandishing a firearm and possessing a short-barreled shotgun). The court sentenced Glover to concurrent terms of 78 months of imprisonment on the Hobbs Act counts, a consecutive term of 120 months on the first Section 924(c) count, and a consecutive term of 300 months on the second Section 924(c) count, for a total term of 498 months of imprisonment. ROA 270. The court sentenced Davis to concurrent terms of 188 months of imprisonment on the Hobbs Act counts, a concurrent term of 180 months on the felon-in-possession count, a consecutive term of 120 months on the first Section 924(c) count, and a consecutive term of 300 months on the second Section 924(c) count, for a total term of 608 months of imprisonment. Davis Am. Judgment 2.[1]

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[1] At the time of respondents' sentencing, Section 924(c) provided for enhanced minimum penalties for defendants convicted of multiple violations in a single proceeding. See 18 U.S.C. 924(c)(1)(C)(i)

C. Respondents' Initial Appeal And Petitions For Writs Of Certiorari

1. The court of appeals affirmed respondents' convictions and sentences. Pet. App. 10a-17a. The court rejected respondents' renewed constitutional challenge to Section 924(c)(3)(B). *Id.* at 12a-14a. The court relied on a recent en banc decision holding that the definition of a "crime of violence" in 18 U.S.C. 16(b), which is linguistically nearly identical to Section 924(c)(3)(B), was "not unconstitutionally vague in light of *Johnson*." Pet. App. 13a (citing *United States* v. *Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc), vacated, 138 S. Ct. 2668 (2018)).

The court of appeals also rejected Glover's alternative contention that "the jury should decide what constitutes a crime of violence." Pet. App. 14a n.4; see Glover C.A. Br. 18, 25-26. The court observed that circuit precedent treated the crime-of-violence determination as "a question of law reserved for the judge." Pet. App. 14a n.4 (citing *United States* v. *Credit*, 95 F.3d 362, 364 (5th Cir. 1996), cert. denied, 519 U.S. 1138 (1997)). The government's appellate brief, in addition to noting that Glover's proposed construction was foreclosed by circuit precedent, had also explained that any error in failing to seek a jury finding would have been harmless, because "the evidence was overwhelming" that respondents' crimes were "committed * * * in a way that involved the use

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(2012); *Deal* v. *United States*, 508 U.S. 129, 132-137 (1993). In the First Step Act of 2018, Pub. L. No. 115-391 (enacted Dec. 21, 2018; see S. 756, 115th Cong., 2d Sess. (2018)), Congress limited the applicability of the enhanced minimum penalties, in cases where a sentence "ha[d] not been imposed" before the Act's enactment, to violations of Section 924(c) that "occur[] after a prior conviction under [Section 924(c)] has become final." § 403(a)-(b).

or threatened use of force or posed a substantial risk that force would be used." Gov't C.A. Br. 28-29. The government observed, for example, that the trial evidence had established that Glover "thrice put a sawed-off shotgun to a woman—and his accomplice did so once—to demand her submission to his theft of cigarettes." *Id.* at 27.

2. Respondents petitioned for writs of certiorari, seeking review of whether the definition of a "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague. See Pet. App. 1a. While respondents' petitions were pending, this Court decided *Sessions* v. *Dimaya*, *supra*, which held that the definition of a "crime of violence" in 18 U.S.C. 16(b), as incorporated into the removability provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, is unconstitutionally vague. See 138 S. Ct. at 1210, 1213.

Dimaya involved the application of Section 16(b) to classify an alien's prior state conviction as a "crime of violence" for purposes of removing him from the United States. See 138 S. Ct. at 1211-1212. Section 16(b), which is linguistically nearly identical to Section 924(c)(3)(B), defines a "crime of violence" to include "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 16(b). But unlike Section 924(c)(3)(B)—and like the ACCA's residual clause at issue in *Johnson*—Section 16(b) applies in circumstances that include the classification of prior convictions (as in *Dimaya* itself). See *Dimaya*, 138 S. Ct. at 1212-1213 (plurality opinion).

The Court explained in *Dimaya* that Section 16(b), as incorporated into the INA, suffered from "the same

two features," "combined in the same constitutionally problematic way," that had led the Court to find the ACCA's residual clause unconstitutionally vague in *Johnson*. *Dimaya*, 138 S. Ct. at 1213. The first feature was a "categorical approach" to the crime-of-violence inquiry, under which a court would seek "to identify a crime's 'ordinary case'" and to assess whether the crime, in that idealized "ordinary case," poses a substantial risk that physical force will be used. *Id.* at 1211, 1215. The second feature was "uncertainty about the level of risk that makes a crime 'violent.'" *Id.* at 1215. The Court emphasized in *Dimaya*, as it had in *Johnson*, that it "'d[id] not doubt' the constitutionality of applying" a "'substantial risk'" standard like Section 16(b)'s "'to real-world conduct,'" rather than to "'a judge-imagined abstraction.'" *Id.* at 1215-1216 (quoting *Johnson*, 135 S. Ct. at 2558, 2561).

Although the Court's holding in *Dimaya* was premised on the applicability of the categorical approach, only a plurality of Justices concluded that Section 16(b) necessarily requires such an approach. See 138 S. Ct. at 1216-1218. The plurality recognized the Court's "'plain duty,' under the constitutional avoidance canon, to adopt any reasonable construction of a statute that escapes constitutional problems." *Id.* at 1216 (citations omitted). But it concluded that, in the context of Section 16(b), the canon did not counsel a circumstance-specific approach that would examine "the risk posed by a particular defendant's particular conduct," because such an approach "would merely ping-pong us from one constitutional issue to another." *Id.* at 1216-1217. The plurality explained that the categorical approach was itself designed in part to avoid Sixth Amendment concerns that would arise from judicial factfinding about the details of

prior convictions in certain sentencing contexts to which Section 16(b) applies. *Ibid.* The plurality also took the view that, "[i]n any event," Section 16(b)'s text is "[b]est read" to "demand[] a categorical approach." *Ibid.*

Justice Gorsuch, who concurred in part and concurred in the judgment, authored a separate opinion describing "some limits on today's holding." *Dimaya*, 138 S. Ct. at 1232. Justice Gorsuch explained that he had "proceeded on the premise" that the INA, "as it incorporates" Section 16(b), employs a categorical approach because "no party" had argued against that approach; precedent "seemingly require[d]" it; and the government had "repeatedly" acknowledged the propriety of such an approach. *Ibid.* Justice Gorsuch stated, however, that he "remain[ed] open to different arguments" about the Court's "precedent and the proper reading of language" like Section 16(b)'s in a future case. *Id.* at 1233.

In dissent, Justice Thomas, joined by Justices Kennedy and Alito, would have eschewed a categorical approach to Section 16(b) in favor of a focus on the underlying, real-world conduct of the alien's prior offense. *Dimaya*, 138 S. Ct. at 1254-1259. Justice Thomas explained that the underlying-conduct approach was both the "better" reading of Section 16(b), *id.* at 1255, and consistent with the constitutional-avoidance canon, *id.* at 1257; see *id.* at 1234-1241 (Roberts, C.J., dissenting) (not addressing whether Section 16(b) requires a categorical approach).

3. This Court subsequently granted respondents' petitions for writs of certiorari, vacated the judgment of the court of appeals in respondents' case, and remanded to the court of appeals for further consideration in light of *Dimaya*. See 138 S. Ct. 1979, 1979; 138 S. Ct. 1979, 1979-1980.

D. The Court Of Appeals' Decision On Remand

On remand, the government acknowledged that it had previously argued, consistent with circuit precedent, that Section 924(c)(3)(B) requires an ordinary-case categorical approach of the sort ascribed to Section 16(b) in *Dimaya*. Gov't Second Supp. C.A. Letter Br. 6. The government observed, however, that such an interpretation "raise[d] serious constitutional questions" in light of *Dimaya*, *ibid.*, and it accordingly urged the court of appeals to avoid those questions by construing Section 924(c)(3)(B) to instead require a circumstance-specific approach, *id.* at 6-7. Under that construction, "the classification of an offense as a 'crime of violence' under" Section 924(c)(3)(B) would "be based on the defendant's actual conduct" underlying the Section 924(c) prosecution. *Id.* at 6. The government pointed out that Section 924(c)(3)(B), unlike Section 16(b) or the ACCA's residual clause, is never applied to classify prior convictions and is instead confined only to the conduct for which a defendant is currently being prosecuted. *Id.* at 10-11. And the government explained that the failure to submit the substantial-risk inquiry to the jury was harmless because respondents' conduct—"which involved the planned and coordinated use of a sawed-off shotgun to immobilize and threaten employees"—"undoubtedly involved a substantial risk that force may be used during commission of the conspiracy" to commit Hobbs Act robbery. *Id.* at 23-24.

The court of appeals, however, declined to construe Section 924(c)(3)(B) in a manner that would avoid the constitutional difficulties identified in *Dimaya* and instead struck down Section 924(c)(3)(B) as impermissibly vague. Pet. App. 5a. The court adhered to circuit

precedent applying an ordinary-case categorical approach to Section 924(c)(3)(B) and concluded that the provision, so construed, is unconstitutional in light of *Dimaya*. *Id.* at 4a-5a. Because the court determined that the offense underlying one of the Section 924(c) counts of conviction for each respondent—conspiracy to commit Hobbs Act robbery—could qualify as a "crime of violence" only under Section 924(c)(3)(B), it vacated respondents' convictions on those counts and remanded to the district court with instructions to excise the sentences imposed as a result of those convictions. *Id.* at 4a, 6a. Judge Higginbotham concurred in the vacatur of the convictions, but wrote separately to object to the court's failure to remand for a full resentencing. *Id.* at 7a-9a.

SUMMARY OF ARGUMENT

The court of appeals erred in interpreting 18 U.S.C. 924(c)(3)(B) in a manner that rendered it unconstitutionally vague under *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). Section 924(c)(3)(B)'s subsection-specific definition of "crime of violence" applies only to the conduct for which the defendant is currently being prosecuted, not to any conduct for which the defendant may have been convicted in the past. The best construction of the provision in that context requires a circumstance-specific determination about whether that *actual* offense conduct—not the conduct of a hypothetical defendant in an "ordinary case"—satisfies the substantial-risk test in 18 U.S.C. 924(c)(3)(B). That construction, moreover, is confirmed by the canon of constitutional avoidance because the ordinary-case categorical approach would raise serious constitutional questions under this Court's decisions in *Dimaya* and *Johnson* v. *United States*, 135 S. Ct. 2551, 2561 (2015). And because no serious question exists that a properly instructed jury

would have found that respondents' armed-robbery conspiracy "by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B), their vacated convictions should be reinstated.

I. This Court's decisions in *Dimaya* and *Johnson* "d[id] not doubt" that a provision requiring a jury finding beyond a reasonable doubt about the "substantial risk" created by a defendant's own "real-world conduct," would be fully constitutional. *Dimaya*, 138 S. Ct. at 1215 (quoting *Johnson*, 135 S. Ct. at 2561). As the government and several courts of appeals have recognized after *Dimaya*, Section 924(c)(3)(B) is best construed to require precisely that sort of commonplace circumstance-specific approach.

In a Section 924(c) prosecution, the jury already must determine (or the defendant must admit through a plea) that the defendant engaged in conduct that meets the elements of a discrete federal felony; that he did so while using, possessing, or carrying a firearm; and that the firearm had the requisite connection to the crime. In that context, the provision is best read to require the jury also to determine (or the defendant also to admit) that the defendant's conduct presented a "substantial risk" of physical force. 18 U.S.C. 924(c)(3)(B). That is exactly the type of fact-specific determination that juries are regularly called upon to make. A categorical approach that instead substitutes a judicial conjecture about the risk presented by the "judge-imagined abstraction" of "an idealized ordinary case of the crime," *Dimaya*, 138 S. Ct. at 1216 (citation omitted), would incongruously wrest authority *away* from the jury.

In the context of describing current conduct, rather than a prior conviction, the surrounding text of Section 924(c)(3)(B) further confirms a circumstance-specific approach, rather than a categorical one. Section 924(c)(3)(B) looks to the "course of committing the offense"—*i.e.*, the same conduct that the government already must prove to the jury in order to satisfy the other requirements of the statute. 18 U.S.C. 924(c)(3)(B). The provision uses the words "offense," "felony," and "involves," each of which this Court already has recognized to be consistent with a circumstance-specific inquiry. See *Nijhawan* v. *Holder*, 557 U.S. 29, 33-40 (2009). And the "nature" of the offense that the defendant has committed in a particular case is not an abstraction, but instead the conduct itself, stripped of any extraneous considerations such as the defendant's own subjective predilections toward or away from violence.

Notwithstanding the best contextual reading of the text and Congress's intentional decoupling of Section 924(c)(3)'s subsection-specific definition of a "crime of violence" from the more general one in 18 U.S.C. 16, courts and the government have in the past treated those definitions congruently for purposes of applying this Court's categorical-approach jurisprudence. But any assumption that Congress intended Section 924(c)(3)(B) to be interpreted the same way as the similarly worded provisions in Section 16(b) or the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii), cannot withstand this Court's identification of the ordinary-case categorical approach as a fatal defect in those other provisions. The categorical approach developed in large part due to concerns specific to the context of classifying *prior* convictions—an issue with Section 16(b) and the ACCA's residual

clause, but not with Section 924(c)(3)(B). Because Section 924(c)(3)(B) is limited to conduct already before a jury, a categorical approach is not necessary to avoid either the practical difficulties of attempting to determine the precise conduct underlying a long-ago conviction, nor the constitutional concerns that might arise from a sentencing court making factual determinations about such past conduct. Stripped of those concerns, therefore, the Court should adopt a reading of Section 924(c)(3)(B) that best comports with its text and purpose.

Indeed, were there any doubt on this score, it would be resolved by the longstanding rule that courts should adopt an available interpretation of a statute that avoids raising serious constitutional concerns. Whereas a circumstance-specific approach in the prior conviction context raised concerns about the denial of a defendant's jury-trial rights, a circumstance-specific approach to Section 924(c)(3)(B) actually *increases* the jury's role, while also avoiding the vagueness concerns this Court identified in *Johnson* and *Dimaya*. And it furthers the separation-of-powers rationale that animates the constitutional-avoidance canon, by respecting Congress's evident intent to punish offenders who employ firearms during and in relation to violent crimes. Interpreting Section 924(c)(3)(B) in a manner that renders it unconstitutional would forestall current and future prosecutions of clearly dangerous criminals under Section 924(c)(3) and allow already-incarcerated ones back on the streets.

II. Applying governing circuit precedent, the district court in this case concluded that respondents' conspiracy to commit Hobbs Act robbery categorically qualified as a crime of violence under Section 924(c)(3)(B). Although the court therefore did not instruct the jury

to determine whether the conduct involved in respondents' own conspiracy "by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B), that error was harmless beyond a reasonable doubt. The course of respondents' conspiracy involved the planning and execution of a string of violent armed robberies in which respondents ambushed store clerks, held them at gunpoint, and threatened to injure them if they did not comply with respondents' demands for cigarettes and cash. Under the constitutionally valid circumstance-specific approach to Section 924(c)(3)(B), a jury would unquestionably have found that respondents' conduct satisfied the statute. At a minimum, a new trial before a properly instructed jury is warranted.

ARGUMENT

Respondents were validly convicted under 18 U.S.C. 924(c) (2012) for brandishing a sawed-off shotgun in furtherance of their conspiracy to rob a string of convenience stores. This Court has "not doubt[ed] the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1214 (2018) (quoting *Johnson* v. *United States*, 135 S. Ct. 2551, 2561 (2015)). Section 924(c)(3)(B)'s definition of "crime of violence" calls for just such an application of just such a standard. 18 U.S.C. 924(c)(3)(B). The jury that is making findings about a defendant's firearm-connected offense conduct can also make a finding about whether the conduct "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Ibid.* That circumstance-specific approach is

supported not only by the statutory language, as used in the limited context of describing the acts for which the defendant currently is being prosecuted, but also by courts' duty to avoid reading in the ordinary-case categorical approach that doomed the provisions at issue in *Johnson* and *Dimaya*. And it comports with Congress's evident intent to punish violent offenders like respondents, whose conspiracy to serially terrorize convenience-store clerks to obtain cigarettes and money was unquestionably a "crime of violence."

I. THE DEFINITION OF A "CRIME OF VIOLENCE" IN 18 U.S.C. 924(c)(3)(B) IS CONSTITUTIONALLY VALID

To convict a defendant of violating Section 924(c), the jury must determine (or the defendant must admit in a plea) that he carried, used, or possessed a firearm; that he "committed all the acts necessary to be subject to punishment for" a separately proscribed "crime of violence"; and that the carrying, use, or possession of the firearm was sufficiently connected to those acts. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). In making those determinations, the jury is well-positioned also to determine whether those acts constituted a "crime of violence" under Section 924(c)(3)(B). Although courts and the government generally have not historically interpreted Section 924(c)(3)(B) to call for such a circumstance-specific inquiry, this Court's decision in *Dimaya*—which makes clear that the prior approach would render the provision unconstitutional—has invited a closer examination of the issue. As several courts of appeals have recognized, the language of Section 924(c)(3)(B), in the context of a criminal statute that contemplates a jury's consideration of the relevant offense conduct, readily embraces a circumstance-specific

approach. And the canon of constitutional avoidance confirms the propriety of that approach.

A. Section 924(c)(3)(B) Is Best Read To Require A Circumstance-Specific Inquiry By The Jury That Is Deciding Whether A Defendant's Conduct Violated Section 924(c)

Congress has frequently enacted provisions that require a "'circumstance-specific'" determination, based on "the facts and circumstances," of whether "the specific way" in which a crime was committed "on a specific occasion" meets a statutory definition. *Nijhawan* v. *Holder*, 557 U.S. 29, 34 (2009) (construing provision in that manner); see, *e.g.*, *id.* at 38-39 (providing other examples); *United States* v. *Hayes*, 555 U.S. 415, 426 (2009) (construing statute in same way). Section 924(c)(3)(B) fits comfortably within that mold.

1. In the context of a jury trial on a Section 924(c) charge, Section 924(c)(3)(B)'s "substantial risk" requirement suggests a jury question

A prosecution under Section 924(c) necessarily focuses on what the defendant actually did. The jury must find conduct that meets the elements of a separate federal felony—*e.g.*, kidnapping—whether or not the defendant also is prosecuted for that underlying crime. See *Rodriguez-Moreno*, 526 U.S. at 280. And the jury must inquire into the specifics of the defendant's acts in order to make the further finding that the defendant "use[d] or carrie[d]" a firearm "during and in relation to," or "possess[ed]" a firearm "in furtherance of," his otherwise-unlawful conduct. 18 U.S.C. 924(c)(1)(A). All of those findings depend "exclusively" on the evidence

before the jury about the circumstances of the defendant's own case. *Ovalles* v. *United States*, 905 F.3d 1231, 1248 (11th Cir. 2018) (en banc).

When those findings are made, the only remaining requirement for conviction under Section 924(c) is that the crime connected to the firearm be a "drug trafficking crime" or a "crime of violence." 18 U.S.C. 924(c)(1)(A). For an alleged "drug trafficking crime," no further jury finding is required. Because a "drug trafficking crime" is defined to include "any felony punishable" under certain federal laws, see 18 U.S.C. 924(c)(2), the jury's finding of guilt following instruction on the elements of, say, methamphetamine manufacturing, in violation of 21 U.S.C. 841(a), will automatically show that the defendant committed such a crime. The same is true for the first definition of "crime of violence" in 18 U.S.C. 924(c)(3)(A), which includes any "offense that is a felony" and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Where a defendant is charged with, say, using a firearm during and in relation to a robbery, and the jury instructions therefore include the elements of robbery under the Hobbs Act, in violation of 18 U.S.C. 1951(a), a guilty verdict necessarily reflects its finding of a force-related element, without any further inquiry into the specifics. See *Stokeling* v. *United States*, 139 S. Ct. 544, 555 (2019) (finding common-law robbery categorically satisfies identically worded clause of the ACCA).

The alternative definition of "crime of violence" in Section 924(c)(3)(B), however, does not turn on where in the federal code the conduct is proscribed (as with "drug trafficking crime") or what "element[s]" that proscription "has" (as with Section 924(c)(3)(A)'s "crime of

violence" definition). Instead, it includes any felony offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). Its position within the statutory structure dictates that it must include conduct that is not otherwise covered by Section 924(c)(3)(A). Cf. *DePierre* v. *United States*, 564 U.S. 70, 83 (2011) (describing principle that different provisions of a statute are presumed to have different meanings). But following this Court's decision in *Dimaya*, courts have diverged about how to determine whether a defendant's conduct is a "crime of violence" under Section 924(c)(3)(B).

The court below adhered to circuit precedent interpreting the definition to require a form of "categorical" approach, under which a judge, without regard to the jury's findings about a defendant's own conduct, imagines the "ordinary" conduct that would meet the elements on which the jury was instructed. See Pet. App. 4a-5a. The judge then makes an assessment about whether that hypothetical ordinary case carries the sort of substantial risk that Section 924(c)(3)(B) requires. *Id.* at 5a. Under that approach, a particular Section 924(c) defendant's own conduct is irrelevant. If, for example, a judge concludes that the "ordinary" case of transporting a minor for illegal sexual activity, in violation of 18 U.S.C. 2423(a), is nonviolent, then it does not matter whether a particular defendant beat and threatened a minor in order to coerce her acquiescence. Notwithstanding that the ordinary-case categorical approach completely disregards the defendant's own conduct, and the jury's otherwise exclusive role in determining it, the courts and the government have—with some difficulty—applied that approach for many years.

As several courts of appeals and the government have now recognized, however, that approach not only renders the statute unconstitutionally vague in light of *Dimaya*, see pp. 44-48, *infra*, but is incongruous with the conduct-based focus of Section 924(c) and the traditional domain of a jury at a criminal trial. See *United States* v. *Douglas*, 907 F.3d 1, 13-17 (1st Cir. 2018), petition for cert. pending, No. 18-7331 (filed Jan. 7, 2019); *Ovalles*, 905 F.3d at 1248-1250; *United States* v. *Barrett*, 903 F.3d 166, 181-184 (2d Cir.), petition for cert. pending, No. 18-6985 (filed Dec. 3, 2018). The substantial-risk determination is one that a jury is well-positioned to make (or find not to be supported) on the facts before it. And the customary way to apply a "qualitative standard such as 'substantial risk'" is to do so by reference "to real-world conduct," not to a hypothetical, judicially imagined "ordinary case" of the crime. *Johnson*, 135 S. Ct. at 2561. As this Court has recognized, "dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk,'" and "almost all" of them "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Ibid.*

For example, a typical reckless-endangerment or criminal-recklessness offense is defined as "recklessly engag[ing] in conduct which creates a substantial risk of serious physical injury to another person." N.Y. Penal Law § 120.20 (McKinney 2009); see, *e.g.*, Ala. Code § 13A-6-24(a) (LexisNexis 2015); Alaska Stat. § 11.41.250(a) (2016); Ariz. Rev. Stat. Ann. § 13-1201(A) (2010); Ark. Code Ann. § 5-13-205(a)(1) (2013); N.D. Cent. Code § 12.1-17-03 (2012). Many other offenses in disparate areas of the criminal law—including arson, theft, sexual assault, threats, resisting arrest, vehicular

homicide, and kidnapping—use comparable risk-based formulations to define the crime or aggravating elements. See, *e.g.*, 21 U.S.C. 858; Conn. Gen. Stat. Ann. § 53a-111(a)(4) (West 2012); Ind. Code Ann. § 35-43-4-2(a)(2) (LexisNexis Supp. 2018); Iowa Code Ann. § 709.3(1)(a) (West 2016); Md. Code Ann., Crim. Law § 3-1001(c) (LexisNexis Supp. 2018); Mass. Ann. Laws ch. 265, § 13L (LexisNexis 2010); Utah Code Ann. § 76-5-301(1)(b) (LexisNexis 2017); see also *Ovalles*, 905 F.3d at 1250 n.8 (providing additional examples); Gov't Supp. Br. App. at 1a-99a, *Johnson*, *supra* (No. 13-7120) (same).

Section 924(c)(3)(B) is best construed to similarly contemplate a finding by the same jury that is otherwise determining whether the defendant's conduct violated the statute. Where the jury instructions do not already require the jury to find the sort of "element" described in Section 924(c)(3)(A), the judge would instruct the jury that it must make the "crime of violence" finding for itself by determining, based on the facts of the offense that the jury already is required to find, whether the defendant's conduct by its nature involved a substantial risk that physical force may have been used against the person or property of another in the course of committing that offense. See *Ovalles*, 905 F.3d at 1252. "There is nothing remarkable about asking jurors to make that sort of risk determination—and, if necessary, requiring judges to instruct jurors on the meaning of terms like 'substantial' and 'physical force' "; indeed, that is "exactly how similar questions have been resolved for centuries and are resolved every day in courts throughout the country." *Id.* at 1250 n.8; see *Dimaya*, 138 S. Ct. at 1215; *Johnson*, 135 S. Ct. at 2561.

Since *Dimaya*, several courts of appeals have adopted, at the government's urging, a circumstance-specific approach to Section 924(c)(3)(B). See *Douglas*, 907 F.3d at 4; *Ovalles*, 905 F.3d at 1234; *Barrett*, 903 F.3d at 169. Within those circuits, district courts have instructed juries to determine, on the facts before them, whether a charged underlying offense qualifies as a "crime of violence" under Section 924(c)(3)(B). See, *e.g.*, 7/16/18 Tr. at 594-595, *United States* v. *Blanco*, No. 16-cr-408 (S.D.N.Y.); 8/20/18 Tr. at 1870-1871, *United States* v. *Cook*, No. 17-cr-65 (D. Conn.); 11/5/18 Tr. at 947-948, *United States* v. *Ullah*, No. 18-cr-16 (S.D.N.Y.); see also Jury Instructions at 56, *United States* v. *Fisher*, No. 15-cr-20652 (E.D. Mich. Aug. 22, 2018). Those juries have been able to follow those instructions and reach verdict in those cases.

2. The surrounding text of Section 924(c)(3)(B) supports submitting the substantial-risk question to the jury

As this Court has repeatedly explained, statutory language "cannot be construed in a vacuum." *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)). Rather, "a fundamental canon of statutory construction" is "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Ibid.* (citation omitted). Congress enacted Section 924(c)(3)(B)'s "crime of violence" definition "[f]or purposes of this subsection"—*i.e.*, exclusively for Section 924(c). 18 U.S.C. 924(c)(3). In that context, where the government *already* must prove to the jury the conduct that constitutes the "crime of violence," the statutory text is best read to require the jury *also* to determine whether the conduct "by its nature, involves a substantial risk that physical force

against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). That interpretation accords not only with the jury-suggestive "substantial risk" language, but also with the surrounding text.

a. Section 924(c)(3)(B) focuses its inquiry on "the course of committing the offense." 18 U.S.C. 924(c)(3)(B). The conduct that constitutes "the course of committing the offense" is part of what the jury must find in determining a defendant's guilt or innocence. That language naturally suggests that the same jury should determine the "risk[iness]" of the defendant's actual conduct, *ibid.* —not that the judge should conduct the substantial-risk inquiry based on a "judge-imagined abstraction" of "an idealized ordinary case of the crime," *Dimaya*, 138 S. Ct. at 1216 (citation omitted).

In this context, the "offense" whose "course of commi[ssion]" is at issue is properly understood as the defendant's *own* violation of a legal prohibition, rather than just the legal prohibition in the abstract. As this Court recognized in *Nijhawan* v. *Holder*, *supra*, "in ordinary speech words such as 'crime,' 'felony,' 'offense,' and the like sometimes refer to a generic crime, say, the crime of fraud or theft in general, and sometimes refer to the specific acts in which an offender engaged on a specific occasion, say, *the* fraud that the defendant planned and executed last month." 557 U.S. at 33-34. The Court in *Nijhawan* accordingly interpreted a provision using the term "offense," 8 U.S.C. 1101(a)(43)(M), to "call[] for a 'circumstance-specific,' not a 'categorical,' interpretation"—even though neighboring uses of the word "offense" required the opposite. 557 U.S. at 36; see *id.* at 37-38. Similarly, in *United States* v. *Hayes*, *supra*,

the Court interpreted the phrase "an offense * * * committed by a current or former spouse," 555 U.S. at 420 (quoting 18 U.S.C. 921(a)(33)(A)), to contemplate a factual, rather than a categorical, inquiry, see *id.* at 426-429.

The circumstance-specific meaning of "offense" is consistent with the only other use of the term in Section 924(c)(3). Section 924(c)(3) defines a "crime of violence" as an "offense that is a felony" that satisfies either the elements clause of Section 924(c)(3)(A) or the substantial-risk inquiry of Section 924(c)(3)(B). 18 U.S.C. 924(c)(3). The term "felony," like the term "offense," can have a circumstance-specific meaning. See *Nijhawan*, 557 U.S. at 33-34. And because the circumstance-specific meaning of the term "offense" encompasses *both* the defendant's acts *and* the law those acts violated, Section 924(c)(3) is best interpreted to classify an "offense" as a "crime of violence" when it either has particular conduct "as an element" *or* is "committ[ed]" in a particular way. 18 U.S.C. 924(c)(3)(A) and (B). This Court construed the term "offense" that way in *Hayes*, which involved a definition requiring that an "offense" simultaneously be "'a misdemeanor'"; have a particular type of "'element'"; and also circumstance-specifically be "'committed'" by a person with a particular relationship to the victim. 555 U.S. at 421 (quoting 18 U.S.C. 921(a)(33)(A)).

b. Section 924(c)(3)(B)'s requirement of an inquiry into whether the commission of the offense "involves" the substantial risk of physical force also supports a circumstance-specific approach. 18 U.S.C. 924(c)(3)(B). Congress has employed the term "involves" in many provisions of the criminal code—including in other provisions enacted as part of the statute that added the "crime of violence" language to Section 924(c)—in a

manner "that require[s] looking into a defendant's underlying conduct rather than a hypothetical or idealized offense." *Douglas*, 907 F.3d at 12 (citing provisions of the Comprehensive Crime Control Act of 1984 (Comprehensive Crime Control Act), Pub. L. No. 98-473, Tit. II, 98 Stat. 1976)). Another provision of Section 924(c), for example, provides an enhanced penalty for subsequent convictions under that statute "if the firearm *involved* is a machinegun or a destructive device." 18 U.S.C. 924(c)(1)(C)(ii) (2012) (emphasis added). Other statutes contain similar language in the definition of either basic elements or sentence-enhancing facts that a jury must find about a defendant's conduct in the context of a criminal prosecution.[2]

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[2] See, *e.g.*, 18 U.S.C. 43(a)(1) and (2)(B) (prohibiting interference with an "animal enterprise" "by a course of conduct *involving* threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation") (emphasis added); 18 U.S.C. 111(a) (providing enhanced penalty for assault on federal officer that "*involve[s]* physical contact with the victim of that assault or the intent to commit another felony") (emphasis added); 18 U.S.C. 351(e) (same for assault of Members of Congress, cabinet officials, and Supreme Court Justices "if the assault *involved* the use of a dangerous weapon") (emphasis added); 18 U.S.C. 666(b) (prohibiting theft or bribery in connection with "Federal program[s] *involving* a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance") (emphasis added); 18 U.S.C. 670(b)(2)(A) (providing enhanced penalty for theft of medical products that "*involves* the use of violence, force, or a threat of violence or force") (emphasis added); 18 U.S.C. 1028(b)(1)(D) (providing enhanced penalty for identity fraud "that *involves* the transfer, possession, or use" of identification to obtain $1000 or more in value) (emphasis added); 18 U.S.C. 1035(a) (prohibiting false statements "in any matter *involving* a health care benefit program") (emphasis added); 18 U.S.C. 1341, 1343 (same for mail and wire fraud "*involving* any benefit" provided in connection with national disasters or emergencies) (emphasis added); 18 U.S.C. 2118(a) and (e)(3) (prohibiting robberies of

Even where provisions classify *prior* convictions—whose underlying facts are *not* already before a later tribunal—the word "involves" can be consistent with a circumstance-specific approach. In *Taylor* v. *United States*, 495 U.S. 575 (1990), the Court pointed to the word's *absence* as one reason to adopt a categorical, rather than circumstance-specific, approach to determining whether a defendant had a sentencing-enhancing prior conviction for "burglary" under the ACCA. *Id.* at 600. The Court also has recognized that the presence of the word "involves" complicated its adoption of a categorical approach to the ACCA's residual clause. See *Nijhawan*, 557 U.S. at 36. And it has interpreted an INA provision concerning the classification of a prior conviction that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" to require a categorical approach with respect to the fraud-or-deceit inquiry and a circumstance-specific approach with respect to the amount of loss. 8 U.S.C. 1101(a)(43)(M)(i); see *Kawashima* v. *Holder*, 565 U.S. 478, 483-485 (2012); *Nijhawan*, 557 U.S. at 40. A circumstance-specific interpretation of "involves" is also consistent with other

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controlled substances that result in "significant bodily injury," defined as "bodily injury which *involves* a risk of death, significant physical pain," or other specified injuries) (emphasis added); 18 U.S.C. 2252(a)(1)(A) (prohibiting transmission of "any visual depiction" that "*involves* the use of a minor engaged in sexually explicit conduct") (emphasis added); 18 U.S.C. 3592(c)(6) (authorizing sentence of death for homicide offense upon jury finding that "[t]he defendant committed the offense in an especially heinous, cruel, or depraved manner in that it *involved* torture or serious physical abuse to the victim") (emphasis added).

criminal statutes that use the word in a circumstance-specific manner in the context of a prior offense.[3]

c. In the context of conduct currently before the jury, the modifier "by its nature" further supports a circumstance-specific approach. "[T]he word 'nature' as used in the phrase 'by its nature' is commonly understood to mean 'the basic or inherent features, character, or qualities of something.'" *Barrett*, 903 F.3d at 182 (quoting *Oxford Dictionary of English* 1183 (3d ed. 2010)); see, *e.g.*, *Webster's Third New International Dictionary* 1507 (2002) (variously defining "nature" as the "normal and characteristic quality," "essential character," and "distinguishing qualities or properties of something"). In the context of Section 924(c)(3)(B), that "something" is the defendant's particular conduct in violation of federal law. *Ovalles*, 905 F.3d at 1247; see *Douglas*, 907 F.3d at 11; *Barrett*, 903 F.3d at 182. "It is entirely natural to use words like 'nature' and 'offense' to refer to an offender's actual underlying conduct." *Dimaya*, 138 S. Ct. at 1254 (Thomas, J., dissenting); see *id.* at 1254 n.7 (listing examples); *Schware* v. *Board of Bar Exam'rs*, 353 U.S. 232, 242-243 (1957) (describing

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[3] See, *e.g.*, 18 U.S.C. 3592(c)(2) (authorizing sentence of death for homicide offense upon jury finding that defendant had "previously been convicted of a Federal or State offense * * * involving the use or attempted or threatened use of a firearm"); 18 U.S.C. 3592(c)(4) (same where defendant had "previously been convicted of 2 or more Federal or State offenses * * * involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person"); see also *United States* v. *Rodriguez*, 581 F.3d 775, 805-807 (8th Cir. 2009) (rejecting argument that categorical approach should apply to Section 3592(c)(4)), cert. denied, 562 U.S. 981 (2010); *United States* v. *Higgs*, 353 F.3d 281, 316-317 (4th Cir. 2003) (same for Section 3592(c)(2)), cert. denied, 543 U.S. 999 (2004).

"the nature of the offense" at issue as "recruiting persons to go overseas to aid the Loyalists in the Spanish Civil War"); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 482 (1993) (O'Connor, J., dissenting) (describing "the nature of the offense at issue" as not "involving grave physical injury" but rather as a "business dispute between two companies in the oil and gas industry").

Two violations of the same criminal statute can have very different natures, such that one "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B), and the other does not. A conspiracy to commit arson of a rival gang's headquarters, for example, is "by its nature" different from a conspiracy to commit arson of one's own property for insurance money. See 18 U.S.C. 844(i) (defining arson to include arson of a defendant's own property). And the focus on the "nature" of the crime has the practical effect of limiting the jury's inquiry to the *offense*, rather than the *offender*, or any other extraneous considerations. The phrase "by its nature" assures, for example, that the jury may not consider evidence of the defendant's prior violent crimes or acts in determining whether a "substantial risk" existed that the defendant might have used force during the instant offense, even if that evidence is admissible for other purposes. See, *e.g.*, *Dowling* v. *United States*, 493 U.S. 342, 344-345 (1990) (discussing use of evidence of prior violent crime for identification purposes). Conversely, a defendant could not seek to establish the lack of a substantial risk by introducing evidence of his peaceful nature or of the non-violent circumstances of his past offenses.

In the context of a *prior conviction*, in contrast, attaching the modifier "by its nature" to the inquiry into whether an offense "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B), might suggest a categorical approach. This Court's decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), for example, focused on that modifier as an indication that the definition of "crime of violence" in 18 U.S.C. 16(b)—which is linguistically almost identical to Section 924(c)(3)(B)[4]—requires a categorical approach in the context of an immigration proceeding that required Section 16(b)'s application to a prior conviction. 543 U.S. at 7; see also *Dimaya*, 138 S. Ct. at 1217 (plurality opinion) (similar). But the "nature" of a prior conviction and the "nature" of the offense underlying a Section 924(c) prosecution are two different things. See, *e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion) (noting that "the same words, placed in different contexts, sometimes mean different things"). Whereas the "nature" of a prior conviction may be the legal determination reflected in the judicial records of that conviction, cf. *Shepard* v. *United States*, 544 U.S. 13, 16 (2005), the "nature" of a current offense is the defendant's particular conduct. The use of the phrase "by its nature" in the jury-trial context of Section 924(c) proceedings thus does not suggest that Congress intended for a judge to resolve the substantial-risk inquiry as an abstract question of law.

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[4] Section 16(b) sets off the phrase "by its nature" in a separate appositive clause; Section 924(c)(3)(B) does not include a comma before the word "by."

B. Congress's Restriction Of Section 924(c)(3)(B) To The Jury-Trial Context Removes The Practical And Constitutional Concerns That Support The Categorical Approach In The Context Of Classifying Prior Convictions

Section 924(c)(3)(B)'s limitation to the classification of an offense already before the jury not only provides critical context for interpreting its language, but also eliminates the practical and constitutional concerns that animated this Court's adoption of the categorical approach for other statutes. The Court has only considered, and only embraced, the categorical approach in the "singular context" of "*judicial* identification of what crimes (most often, state crimes) of *prior* conviction fit federal definitions of violent crimes so as to expose a defendant to enhanced penalties or other adverse consequences in *subsequent* federal proceedings." *Barrett*, 903 F.3d at 181. Although the lower courts and the government previously interpreted Section 924(c)(3)(B) in line with the Court's decisions in the prior-conviction context, the decisions themselves make clear that they rest in large part on practical and constitutional considerations that do not apply in Section 924(c)(3)(B)'s jury-trial context. *Douglas*, 907 F.3d at 13 (observing that the Court "fashioned and refined the categorical approach both for practical and constitutional reasons that are specific to the consideration of a prior conviction"). Those decisions therefore cannot support continued disregard for the best contextual interpretation of Section 924(c)(3)(B). See *Dimaya*, 138 S. Ct. at 1256 (Thomas, J., dissenting) ("[T]he categorical approach was never really about the best reading of the text.").

1. Decisions adopting the categorical approach in the prior-conviction context have anachronistically influenced the interpretation of Section 924(c)(3)(B)

Congress intentionally separated Section 924(c)(3)(B)'s subsection-specific definition of "crime of violence" from other provisions that employ similar language but—unlike Section 924(c)(3)(B)—apply in the context of prior convictions. Before this Court's decision in *Dimaya*, however, lower courts and the government relied on this Court's decisions interpreting those other provisions to adopt a categorical approach to Section 924(c)(3)(B).

a. When Congress enacted Section 924(c)(3)(B)'s subsection-specific "crime of violence" definition in the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(F), 100 Stat. 457, in 1986, this Court had never addressed, let alone endorsed, a categorical approach to the classification of offenses at all. Congress thus would not have anticipated a categorical approach to the classification of a defendant's conduct that is already before the jury, and nothing suggests that it affirmatively wanted to take the substantial-risk inquiry out of the jury's hands. Indeed, it deliberately isolated Section 924(c)(3)(B) from other code provisions that have since been construed to incorporate a categorical approach.

As originally enacted, Section 924(c) made it a crime for an individual to "use[] a firearm to commit *any felony* which may be prosecuted in a court of the United States," or to "carr[y] a firearm unlawfully during the commission" of such a felony. Gun Control Act of 1968, Pub. L. No. 90-618, Tit. I, § 102, 82 Stat. 1224 (emphasis added). In the ensuing years, Congress considered several proposals to "refine the offense by confining it to

its proper and practical boundaries as a means of deterring and punishing the employment of a firearm" during violent crimes. S. Rep. No. 307, 97th Cong., 1st Sess. 889 (1981). In 1981, for example, the Senate Judiciary Committee reported on proposed revisions to Section 924(c) that would have limited the underlying offenses to certain "crime[s] of violence" in a manner similar to the current version except that it also would have included "certain misdemeanors." *Id.* at 888; see *id.* at 888-889 & n.42. The Committee described the scope of misdemeanor coverage in conduct-focused terms, explaining that the proposal would not cover "a 'misdemeanor that consists solely of damage to property and that does not place another person in danger of death or serious bodily injury'"—a limitation that was "intended to exclude situations in which a person, at no risk to human safety, uses a firearm to damage a sign or other object on a Federal reservation or to shoot game unlawfully." *Id.* at 889. And it emphasized that Section 924(c) overall would remain focused on "dangerous criminal *conduct*." *Id.* at 888 (emphasis added).

In 1984, Congress revised Section 924(c) to prohibit "us[ing] or carr[ying] a firearm" "during and in relation to" a federal "crime of violence." Comprehensive Crime Control Act, Ch. X, Pt. D, § 1005(a), 98 Stat. 2138. The 1984 revision to Section 924(c) did not contain its own definition of "crime of violence," but instead incorporated the general definition of that term set forth in 18 U.S.C. 16, which was enacted as part of the same legislation (and which remains unchanged today). See S. Rep. No. 225, 98th Cong., 1st Sess. 307, 313 n.9 (1983) (1983 Senate Report); see also Comprehensive Crime Control Act, Pt. A, § 1001(a), 98 Stat. 2136. The Senate Judiciary Committee explained that the "essence" of

the "crime of violence" definition, as applied to Section 924(c), was that it limited the statute's application to "offenses in which the use of physical force is an element," as well as to "*any felony which carries* a substantial risk of such force," 1983 Senate Report 313 n.9 (emphasis added)—not one that ordinarily (or necessarily) requires such a risk in the abstract.

At the time that amendment was enacted, and for several years thereafter, the "substantial risk" inquiry required under 18 U.S.C. 16(b) was not uniformly understood to require a categorical approach. The government, for example, argued in several Section 924(c) cases that Section 16(b) required a circumstance-specific approach to determining whether drug trafficking offenses qualified as "crime[s] of violence" for purposes of Section 924(c). See, *e.g.*, *United States* v. *Cruz*, 805 F.2d 1464, 1469 (11th Cir. 1986) (noting that the government "asks us to inquire whether the crime, as committed, actually created a substantial risk of harm."), cert. denied, 481 U.S. 1006, and 482 U.S. 930 (1987); *United States* v. *Bushey*, 617 F. Supp. 292, 299 (D. Vt. 1985) (describing government's argument that court should consider whether crime, as committed with a firearm, constitutes a crime of violence). And the Sentencing Commission interpreted Section 16 to cover not only certain categories of offenses (*e.g.*, "murder," "aggravated assault," "robbery") that would invariably meet its requirements, but also "[o]ther offenses * * * if the conduct for which the defendant *was specifically convicted* meets the [statutory] definition." Sentencing Guidelines § 4B1.2, comment. (n.1) (1987) (emphasis added).

After courts began to settle instead on a categorical approach that excluded drug trafficking (which can be committed through nonviolent consensual sales), see,

e.g., *United States* v. *Diaz*, 778 F.2d 86, 88 (2d Cir. 1985) (per curiam), Congress *amended* Section 924(c) to abrogate those decisions. The Firearms Owners' Protection Act both defined "drug trafficking crime[s]" as underlying offenses under Section 924(c) *and* decoupled Section 924(c)'s definition of a "crime of violence" from Section 16 by enacting a new definition of that term in Section 924(c)(3) that applied only "[f]or purposes of this subsection." § 104(a)(2)(B), (C), and (F), 100 Stat. 457; see, *e.g.*, H.R. Rep. No. 495, 99th Cong., 2d Sess. 2 (1986). The decision to give Section 924(c)(3) its own, freestanding crime-of-violence definition contrasted with congressional action regarding other provisions. Congress simultaneously amended 18 U.S.C. 929, which prohibits the possession of armor-piercing ammunition in connection with certain crimes, to include drug-trafficking crimes; but it did *not* disturb Section 929's incorporation of Section 16's definition of "crime of violence." See Firearms Owners' Protection Act § 108, 100 Stat. 460. The addition of a self-contained, subsection-specific "crime of violence" definition in Section 924(c) thus demonstrates Congress's intention for Section 924(c)(3)(B) to stand apart from the more broadly applicable definition in Section 16(b).

b. Any development of a circumstance-specific approach to Section 924(c)(3)(B) tailored to its particular language and context, however, was effectively forestalled by reliance on this Court's developing categorical-approach jurisprudence. Although that jurisprudence arose in the context of prior convictions, it came to predominate the landscape of offense-classification provisions.

The watershed was this Court's 1990 decision in *Taylor* v. *United States*, *supra*. Relying in part on practical

considerations and Sixth Amendment concerns, the Court in *Taylor* held that to determine whether a defendant's prior conviction constitutes the enumerated crime of "burglary" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), courts generally must "look only to the fact of conviction and the statutory definition of the prior offense." 495 U.S. at 602; see *id.* at 601-602; pp. 40-44, *infra*. The ordinary-case categorical approach is a close relative of *Taylor*'s. See *Dimaya*, 138 S. Ct. at 1211 & n.1.

Noting that it was not the first court to do so, this Court in *James* v. *United States*, 550 U.S. 192 (2007), overruled by *Johnson* v. *United States*, *supra*, applied the ordinary-case categorical approach in the context of the ACCA's residual clause, which encompassed prior convictions for an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii). See *James*, 550 U.S. at 208 (citing *United States* v. *Thomas*, 361 F.3d 653, 659 (D.C. Cir. 2004), vacated, 543 U.S. 111 (2005)). The Court explained that application of the ACCA's residual clause requires an analysis of "whether the conduct encompassed by the elements of the offense, in the ordinary case" posed such a risk. *Ibid.* The Court in *Leocal* had taken a similar approach, without much discussion, to the application of Section 16(b) to classify a prior conviction in the context of a civil immigration proceeding. See 543 U.S. at 7. And the plurality in *Dimaya* explicitly took the view that Section 16(b) incorporates *James*'s ordinary-case categorical approach. See 138 S. Ct. at 1217-1218. But at the time that *James* was decided, the application of the categorical approach was not understood to raise any serious constitutional concerns. See *Johnson*, 135 S. Ct. at 2556; *Sykes* v.

United States, 564 U.S. 1, 13 (2011), overruled by *Johnson* v. *United States*, *supra*; *James*, 550 U.S. at 210 n.6; p. 45, *infra*.

In the absence of specific guidance from this Court, or reason to think that the categorical approach presented constitutional concerns, the government and the lower courts generally treated Section 924(c)(3)(B) analogously to similarly worded provisions in the ACCA's residual clause and Section 16(b), despite the provisions' different contexts. Courts of appeals regularly cited *Taylor* when applying the categorical approach to Section 924(c), including when applying Section 924(c)(3)(B). See, *e.g.*, *United States* v. *Taylor*, 176 F.3d 331, 337-338 (6th Cir. 1999); *United States* v. *Kennedy*, 133 F.3d 53, 56 (D.C. Cir. 1998); *United States* v. *Moore*, 38 F.3d 977, 979-981 & n.6 (8th Cir. 1994); *United States* v. *Mendez*, 992 F.2d 1488, 1489-1490 (9th Cir.), cert. denied, 510 U.S. 896 (1993). Courts also continued to treat precedents under Section 924(c)(3) and Section 16 as interchangeable. See, *e.g.*, *United States* v. *Benally*, 843 F.3d 350, 354 (9th Cir. 2016); *United States* v. *Williams*, 343 F.3d 423, 431 (5th Cir.), cert. denied, 540 U.S. 1093 (2003); *Park* v. *INS*, 252 F.3d 1018, 1022 (9th Cir. 2001), overruled by *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121 (9th Cir. 2006); see also, *e.g.*, *United States* v. *Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995) (relying on Section 16(b)'s legislative history to reject defendant's proposal for a circumstance-specific approach to Section 924(c)(3)(B)), cert. denied, 516 U.S. 1164 (1996).

2. The adoption of the categorical approach in the prior-conviction context reflects practical and constitutional concerns that are irrelevant to Section 924(c)(3)(B)

The cross-pollination of circuit law had the unfortunate effect of losing sight of Congress's deliberate isolation of Section 924(c)(3). As several courts of appeals have recognized since *Dimaya*, because Section 924(c)(3)(B) is subsection-specific and never applies to the classification of prior convictions, much of the rationale underlying the categorical approach is absent. Indeed, the practical and constitutional concerns that favored a categorical approach to provisions that classify prior convictions support a circumstance-specific approach to Section 924(c)(3)(B).

a. This Court has made clear that the adoption of the categorical approach for classifying prior convictions rests in part on a practical concern—avoiding "the relitigation of past convictions in minitrials conducted long after the fact," *Moncrieffe* v. *Holder*, 569 U.S. 184, 200-201 (2013)—that does not exist in the Section 924(c)(3)(B) context. A circumstance-specific approach to prior convictions has the "daunting" practical obstacle of requiring a determination—potentially many years later—how a defendant's prior offense actually occurred. *Taylor*, 495 U.S. at 601; see *ibid.* (noting the related "potential unfairness" to defendants from a factual approach to past convictions); see also *Mathis* v. *United States*, 136 S. Ct. 2243, 2253 (2016) (similar); *Shepard*, 544 U.S. at 20 (describing the categorical approach as a "pragmatic" way to "avoid[] subsequent evidentiary enquiries").

Surmounting that obstacle would be a considerable challenge. Convictions underlying an ACCA enhancement are often "adjudicated by different courts in pro-

ceedings that occurred long before the defendant's present sentencing." *Douglas*, 907 F.3d at 14 (citation omitted); see *Taylor*, 495 U.S. at 578 & n.1 (addressing ACCA classification of two prior burglary convictions adjudicated in Missouri state courts 17 and 25 years earlier). The same is true for many statutes that incorporate Section 16(b) in the context of classifying prior convictions, including the INA provision at issue in *Leocal* and *Dimaya*. See *Dimaya*, 138 S. Ct. at 1218 (plurality opinion) (discussing the "utter impracticability" of a circumstance-specific approach to classifying prior convictions under Section 16(b)) (quoting *Johnson*, 135 S. Ct. at 2562). Although Congress has nonetheless sometimes required a circumstance-specific approach to prior convictions, see *Nijhawan*, 557 U.S. at 32; *Hayes*, 555 U.S. at 426, the categorical approach "serves a purpose when evaluating prior state convictions committed long ago in fifty state jurisdictions with divergent laws," *United States* v. *St. Hubert*, 883 F.3d 1319, 1336 (11th Cir.), cert. denied, 139 S. Ct. 246, vacated, 909 F.3d 335, 337 (11th Cir. 2018); see *Douglas*, 907 F.3d at 13.

The categorical approach would serve no such purpose in the context of Section 924(c)(3)(B). As discussed, the application of Section 924(c)(3)(B) does not depend on a historical conviction, but rather on "a crime of *pending* prosecution." *Barrett*, 903 F.3d at 169; see also, *e.g.*, *Shuti* v. *Lynch*, 828 F.3d 400, 449-450 (6th Cir. 2016), cert. denied, 138 S. Ct. 1977 (2018). A Section 924(c) prosecution necessarily involves a "developed factual record" about the underlying crime. *St. Hubert*, 883 F.3d at 1335. Because "the predicate offense and the § 924(c)(3)(B) enhancement are considered at the same time," *Douglas*, 907 F.3d at 13, the practical concerns that favored the adoption of a categorical approach in the context of prior

convictions do not arise in prosecutions under Section 924(c)(3)(B). In fact, in the context of Section 924(c)(3)(B), a circumstance-specific approach is more workable and fair than a categorical one.

This Court has characterized the "'ordinary case'" approach as "an excessively 'speculative,' essentially inscrutable thing" that "'offers significantly less predictability than one that deals with the actual facts.'" *Dimaya*, 138 S. Ct. at 1214-1215 (quoting *Johnson*, 135 S. Ct. at 2558, 2561) (ellipsis omitted). Cf. *Ovalles*, 905 F.3d at 1253 (W. Pryor, J., concurring) ("How did we ever reach the point where this Court, sitting en banc, must debate whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort fired an AK-47 at her family is a crime of violence? It's nuts."). Where "the facts concerning the relevant predicate crime * * * will [already] be in front of a jury," *Douglas*, 907 F.3d at 14, it is far more sensible for the jury to conduct a circumstance-specific inquiry based on the existing factual record than it would be for a judge "to 'imagine' an 'idealized ordinary case of the crime,'" *Dimaya*, 138 S. Ct. at 1214 (quoting *Johnson*, 135 S. Ct. at 2557-2558). As previously discussed, see pp. 20-25, *supra*, juries have long been called upon to make determinations of risk based on the facts of particular cases, with no apparent difficulty, and a jury hearing a Section 924(c) case could easily do the same. See, *e.g.*, *Johnson*, 135 S. Ct. at 2561; *United States* v. *Simms*, No. 15-4640, 2019 WL 311906, at *26-*27 (4th Cir. Jan. 24, 2019) (Wilkinson, J., dissenting).

b. In addition to practical considerations, "this Court adopted the categorical approach in part to 'avoid[] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact'" regarding

prior convictions "'that properly belong to juries.'" *Dimaya*, 138 S. Ct. at 1217 (plurality opinion) (quoting *Descamps* v. *United States*, 570 U.S. 254, 267 (2013)) (brackets in the original); see *id.* at 1253 (Thomas, J., dissenting) (describing Sixth Amendment concerns as the "heart of the decision" to adopt the categorical approach in *Taylor*) (citation omitted). Those Sixth Amendment concerns do not exist in the context of Section 924(c)(3)(B), where it is the jury itself that would make the requisite finding.

For example, a plurality of the Court in *Shepard* v. *United States*, *supra*, suggested that a judge's resolution of the disputed facts underlying a defendant's prior conviction at sentencing would be "too much like" the kind of factfinding that the Sixth Amendment requires the jury to conduct. 544 U.S. at 25; see *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000) (holding that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). The plurality in *Shepard* thus indicated that, in the context of the ACCA's residual clause—which increases certain defendants' statutory sentencing range based on qualifying prior convictions—the categorical approach is supported by the "rule of reading statutes to avoid serious risks of unconstitutionality." 544 U.S. at 25. And in *Dimaya*, a plurality of this Court observed that the same Sixth Amendment concerns counseled against adopting a circumstance-specific approach to Section 16(b), which is incorporated not only into the INA, but also into certain criminal-sentencing provisions, for the purpose of classifying prior convictions. 138 S. Ct. at 1217.

Section 924(c)(3)(B), in contrast, never applies to the classification of prior convictions or to criminal sentencing. It instead provides a subsection-specific definition of "crime of violence" that applies only in the context of a criminal prosecution in which a defendant would enjoy the full protection of the Sixth Amendment's jury-trial right. As a result, "[t]he Sixth Amendment concern is avoided because the trial jury, in deciding whether a defendant is guilty of using a firearm 'during and in relation to any crime of violence,' 18 U.S.C. § 924(c)(1)(A), can decide whether the charged predicate offense is a crime of violence as defined in § 924(c)(3)(B)." *Barrett*, 903 F.3d at 182. In other words, the circumstance-specific approach would result in more jury findings, not fewer. *Douglas*, 907 F.3d at 15. Thus, far from potentially *denying* defendants their jury-trial right, submitting the Section 924(c)(3)(B) inquiry to the jury fully respects it.

C. The Constitutional-Avoidance Canon Requires That Section 924(c)(3)(B) Be Construed To Incorporate A Circumstance-Specific Approach

Stripped of the practical and constitutional concerns that animated this Court's adoption of the categorical approach in the context of prior convictions, this Court should, instead, adopt the circumstance-specific approach for Section 924(c)(3)(B), which, for the reasons explained, reflects the best contextual interpretation of Section 924(c)(3)(B). Indeed, were there any doubt on this score, the same constitutional-avoidance rule that favored the ordinary-case categorical approach in the context of classifying prior convictions militates *against* that approach here. As this Court has repeatedly explained, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is

'fairly possible,' we are obligated to construe the statute to avoid such problems." *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation omitted); see also, *e.g.*, *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018); *United States ex rel. Attorney Gen. of U.S.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909). It is now clear that construing Section 924(c)(3)(B) to incorporate an ordinary-case categorical approach would render it unconstitutional. Thus, even if the circumstance-specific approach were not the best reading of the statutory text, but see pp. 20-32, *supra*, it should be adopted because it is, at a minimum, "'fairly possible.'" *St. Cyr*, 533 U.S. at 300.

1. Before 2015, neither courts nor the government had reason to suspect that applying an ordinary-case categorical approach to Section 924(c)(3)(B) created any constitutional doubt. After endorsing that approach under the ACCA's residual clause in *James*, 550 U.S. at 208, the Court proceeded to apply it in a series of additional cases involving the classification of prior convictions under that clause. See *Begay* v. *United States*, 553 U.S. 137, 141 (2008); *Chambers* v. *United States*, 555 U.S. 122, 125 (2009); *Sykes*, 564 U.S. at 3-4. In two of its decisions, including *James* itself, "the Court rejected suggestions by dissenting Justices that the residual clause violates the Constitution's prohibition of vague criminal laws." *Johnson*, 135 S. Ct. at 2556; see *Sykes*, 564 U.S. at 13; *James*, 550 U.S. at 210 n.6.

The Court then granted certiorari in *Johnson* to apply the ordinary-case categorical approach under the ACCA's residual clause to yet another type of offense. See 135 S. Ct. at 2256. But it subsequently ordered supplemental briefing and reargument, and it then struck down the ACCA's residual clause on Fifth Amendment vagueness grounds. *Ibid.* The Court concluded that

"[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Id.* at 2257. The first was its incorporation of the ordinary-case categorical approach, which "leaves grave uncertainty about how to estimate the risk posed by a crime" by tying "the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Ibid.* The second was "uncertainty about how much risk it takes for a crime to qualify" as categorically risky. *Id.* at 2558. "It is one thing," the Court explained, "to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Ibid.*

Soon after holding for the first time that the ordinary-case categorical approach has vagueness implications, the Court granted certiorari in *Dimaya* to address the constitutionality of the "crime of violence" definition in Section 16(b), as incorporated into an INA provision assigning immigration consequences to a particular type of prior conviction. 138 S. Ct. at 1210. The government did not dispute that Section 16(b), which is also incorporated into numerous provisions that require the classification of prior convictions in the criminal sentencing context—and thus, in those contexts, raises the same practical and constitutional considerations as the ACCA's residual clause—invites an ordinary-case categorical approach. See *id.* at 1217 (plurality opinion) ("Perhaps one reason for the Government's reluctance [to advocate a circumstance-specific approach] is that such an approach would generate its own constitutional questions."). And notwithstanding some textual differences between the ACCA's residual clause and Section 16(b), the Court held Section 16(b) to likewise be unconstitutionally vague because it "has the same two features as

ACCA's, combined in the same constitutionally problematic way." *Id.* at 1213 (majority opinion).

Although courts and the government previously construed Section 924(c)(3)(B) in line with Section 16(b), in light of *Johnson* and *Dimaya*, the canon of constitutional avoidance compels a construction of Section 924(c)(3)(B) that adopts the circumstance-specific approach. Such a construction avoids the vagueness concerns that led this Court to invalidate the ACCA's residual clause and Section 16(b), as incorporated into the INA. As the Court emphasized in both *Johnson* and *Dimaya*, applying a "substantial risk" standard "to real-world conduct" is constitutionally unproblematic. *Dimaya*, 138 S. Ct. at 1215 (quoting *Johnson*, 135 S. Ct. at 2561); see *id.* at 1241 (Roberts, C.J., dissenting); *id.* at 1257 (Thomas, J., dissenting). By contrast, an interpretation of Section 924(c)(3)(B) that steers straight into the teeth of *Johnson* and *Dimaya*—despite the availability of a textually sound alternative interpretation that raises no constitutional doubts—cannot be reconciled with the rule that "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012) (emphasis omitted).

The *Dimaya* plurality's reasons for declining to apply the canon of constitutional avoidance to adopt a circumstance-specific reading of Section 16(b) are inapposite here. Emphasizing the Sixth Amendment concerns that had motivated the categorical approach in the first place, the plurality reasoned that the constitutional-avoidance canon could not "serve * * * as the interpretive tie breaker" for Section 16(b) because it "would merely ping-pong [the Court] from one constitutional

issue to another." *Dimaya*, 138 S. Ct. at 1217. But to the extent that "avoid[ing] the Scylla of the Sixth Amendment['s]" jury-trial right for Section 16(b) necessitated "steer[ing] * * * straight into the Charybdis of the Fifth" Amendment's vagueness concerns, *id.* at 1254 (Thomas, J., dissenting), that is not the case with respect to Section 924(c)(3)(B), where the jury would have a *greater* role under a circumstance-specific approach. See pp. 42-44, *supra*.

And to the extent that the plurality's statement that Section 16(b)'s text is "[b]est read" to "demand[] a categorical approach" suggested its view that no circumstance-specific construction of Section 16(b) was plausible, *Dimaya*, 138 S. Ct. at 1217, Section 924(c)(3)(B)'s limitation to the jury-trial context provides ample support for reading its text differently. See pp. 20-32, *supra*; see also, *e.g.*, *Curtis Johnson* v. *United States*, 559 U.S. 133, 139 (2010) ("Ultimately, context determines meaning."). Indeed, the *Dimaya* plurality's interpretation of Section 16(b) was informed by the "utter impracticability" of a circumstance-specific approach to Section 16(b)'s classification of prior convictions. 138 S. Ct. at 1218 (citation omitted). But such an approach is, if anything, the *more* practical one here.

2. The longstanding rule that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter," *Jones* v. *United States*, 526 U.S. 227, 239 (1999) (citation omitted), is therefore controlling here. Adhering to it would also further the underlying separation-of-powers rationale for the rule,

which arises "out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Id.* at 239-240 (citation omitted).

It is clear from the face of Section 924(c)(3)(B) that Congress intended to punish offenders who employ firearms in the course of committing violent crimes. As the courts' repeated difficulties applying the ACCA's residual clause made clear, see *Johnson*, 135 S. Ct. at 2558-2559, Congress has struggled to develop a form of words that captures that intent in a precise enough way *in the abstract*. But the language it enacted in Section 924(c)(3)(B) is sufficiently precise for circumstance-specific application by a jury. See *Dimaya*, 138 S. Ct. at 1215; *Johnson*, 135 S. Ct. at 2561. Unnecessarily construing that language to refer to an abstraction—and thereby rendering it unconstitutional—would inappropriately undermine Congress's law-enforcement efforts, with severe practical consequences.

In the 12-month period ending June 30, 2018, more than 3000 defendants were charged with a Section 924(c) violation. U.S. Courts, *Table D-2—U.S. District Courts—Criminal Statistical Tables For The Federal Judiciary* (June 30, 2018), http://www.uscourts.gov/statistics/table/d-2/statistical-tables-federal-judiciary/2018/06/30 (Row 68). Invalidating Section 924(c)(3)(B) would impede the enforcement of federal criminal law by effectively immunizing from Section 924(c) prosecution many defendants who commit offenses that do not technically fit within Section 924(c)(3)(A), but that are plainly violent. As the facts of this case illustrate, defendants whose prosecution requires application of Section 924(c)(3)(B) include some of the most violent criminals on the federal docket.

Conspiracy to commit the sort of violent robbery spree at issue here—involving takeover-style armed robberies in which respondents threatened to injure or kill store employees with a loaded short-barreled shotgun—indisputably "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B); see pp. 3-6, *supra* (detailing respondents' crimes). A Hobbs Act conspiracy need not, however, lead to the commission of the planned robbery, see *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961), and thus such a conspiracy does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another," so as to qualify as a "crime of violence" under 18 U.S.C. 924(c)(3)(A).[5]

If Section 924(c)(3)(B) were invalidated, individuals who plan to—or, like respondents, actually do—use a gun in furtherance of a conspiracy that results in a substantial risk of force could escape prosecution under Section 924(c). See *Simms*, 2019 WL 311906, at *1 (vacating Section 924(c) conviction where underlying crime was conspiracy to commit Hobbs Act robbery in which defendant robbed a McDonald's restaurant, "struck the manager with [a] gun, [and] threw a cash drawer at [another] employee"); *United States* v. *Eshetu*,

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[5] The Fifth Circuit has determined that Hobbs Act conspiracy requires proof of at least one "overt act by one of the conspirators to further the conspiracy." *United States* v. *Stephens*, 964 F.2d 424, 427 (1992); see ROA 15-16 (indictment); ROA 1357 (jury instructions). Under general principles of conspiracy law, however, an overt act need not be violent or even "be itself a crime." *Braverman* v. *United States*, 317 U.S. 49, 53 (1942); see 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2(b), at 372-377 (3d ed. 2018).

898 F.3d 36, 36-38 (D.C. Cir.) (per curiam) (vacating Section 924(c) conviction where underlying crime was conspiracy to commit Hobbs Act robbery in which the defendants planned to rob a liquor store using knives and guns), petition for reh'g pending, No. 15-3020 (D.C. Cir. filed Aug. 31, 2018).

Other violent crimes might likewise be excluded. In *United States* v. *Salas*, 889 F.3d 681, petition for cert. pending, No. 18-428 (filed Oct. 3, 2018), for example, the Tenth Circuit held that Section 924(c)(3)(B) is unconstitutionally vague and that federal arson, 18 U.S.C. 844(i), does not qualify as a "crime of violence" under Section 924(c)(3)(A) because it could be committed by setting fire to one's own property, and thus does not have "as an element" the use of force "against the person or property *of another*." 18 U.S.C. 924(c)(3)(A) (emphasis added); see 889 F.3d at 683-684, 687-688. The court accordingly vacated the Section 924(c) conviction of a defendant who firebombed a business with a Molotov cocktail. *Salas*, 889 F.3d at 683, 688.

Similarly, in *United States* v. *Jenkins*, 849 F.3d 390 (2017), vacated, 138 S. Ct. 1980 (2018), the Seventh Circuit determined that Section 924(c)(3)(B) is unconstitutionally vague, *id.* at 394, and that federal kidnapping under 18 U.S.C. 1201(a) does not qualify as a crime of violence under Section 924(c)(3)(A) because holding a person "for ransom or reward or otherwise," 18 U.S.C. 1201(a), "can be accomplished without physical force" (*e.g.*, by tricking the victim), 849 F.3d at 393. It therefore vacated a Section 924(c) conviction where the underlying crime was a kidnapping in which the defendant held the victim at gunpoint, beat him, doused him in gasoline, placed a firework in his mouth, and threatened to

shoot him execution-style. *Id.* at 395; Gov't C.A. Br. at 5-7, *Jenkins*, *supra* (No. 14-2898).

Cases in which defendants are challenging Section 924(c) convictions involving equally violent underlying crimes are currently pending in other courts of appeals. See, *e.g.*, Gov't C.A. Br. at 3-4, 11, *Knight* v. *United States*, No. 17-6370 (6th Cir. Nov. 28, 2018) (assault and robbery of a postal employee, in violation of 18 U.S.C. 2114(a), involving the gunpoint robbery, abduction, and threatened murder of a postmaster); Gov't C.A. Br. at 3-5, 11-14, *Eizember* v. *United States*, No. 17-1406 (8th Cir. Oct. 29, 2018) (kidnapping, in violation of 18 U.S.C. 1201, during which the victims, who had stopped to help the defendant with his disabled car, were pistol whipped and threatened with death); Gov't C.A. Br. at 5-8, 46, *United States* v. *Cruz-Ramirez*, No. 11-10632 (9th Cir. Nov. 17, 2017) (racketeering conspiracies, in violation of 18 U.S.C. 1959(a) and 1962(d), involving multiple gang-related murders). This Court should not adopt an interpretation of Section 924(c)(3)(B) that requires its invalidation, and thus permits defendants who have planned to engage in, or actually committed, such violent acts to escape liability under Section 924(c).

In addition to limiting current and future prosecutions, striking down Section 924(c)(3)(B) would allow currently incarcerated violent criminals back on the streets. A holding of this Court that Section 924(c)(3)(B) requires an ordinary-case categorical approach—and thus is unconstitutionally vague—would be a retroactive substantive rule applicable on collateral review. See *Welch* v. *United States*, 136 S. Ct. 1257, 1264 (2016). Defendants who committed violent crimes like those described above could thus be immediately released from prison, on the

theory that the criminality of their conduct under Section 924(c) was in fact constitutionally indeterminate. Under a circumstance-specific construction of Section 924(c)(3)(B), in contrast, the only prisoners who might be eligible for collateral relief would be those who could show actual innocence under the statute as so construed. See *Bousley* v. *United States*, 523 U.S. 614, 623-624 (1998). Both retrospectively and prospectively, an interpretation of Section 924(c)(3)(B) tailored to punish defendants whose conduct was or is *actually* violent is the most respectful of Congress's efforts.

II. RESPONDENTS' SECTION 924(c) CONVICTIONS ARE VALID BECAUSE A JURY NECESSARILY WOULD HAVE FOUND THAT THEIR CONDUCT INVOLVED A "SUBSTANTIAL RISK" OF PHYSICAL FORCE

Properly construed, Section 924(c)(3)(B) requires a jury to determine (or a defendant to admit through a plea) that his conduct "by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). Although the district court in this case did not instruct the jury to make that determination, that error was harmless beyond a reasonable doubt. See *Neder* v. *United States*, 527 U.S. 1, 8-13 (1999) (holding that a jury instruction that omits an element of the offense may be harmless); *Barrett*, 903 F.3d at 184 (applying harmless-error analysis to uphold Section 924(c)(3)(B) conviction where jury had not been instructed on substantial-risk inquiry).

As the government argued in the court of appeals (Gov't C.A. Br. 27-29; Gov't Second Supp. C.A. Letter Br. 23-25), on the facts of this case, no reasonable doubt exists that a properly instructed jury would have found that respondents' conduct involved a substantial risk of

the use of physical force against the person or property of another. See Fed. R. Crim. P. 52(a). Respondents' conspiracy offense involved the planning and execution of a string of violent armed robberies during which they used a loaded short-barreled shotgun to threaten and immobilize their victims in an effort to force the victims to comply with their demands to hand over merchandise and money. Respondents did not deny their involvement in two of the violent robberies, see ROA 828-831 (Glover); ROA 840-841 (Davis), both of which effectuated and furthered their continuing conspiracy. In addition, in an effort to escape apprehension for the robberies they conspired to commit, respondents engaged police in a high-speed chase on a wet highway that culminated in a crash. Cf. *United States* v. *Reid*, 517 F.2d 953, 965 (2d Cir. 1975) (Friendly, J.) ("The escape phase of a crime is not * * * an event occurring 'after the robbery.' It is part of the robbery.") (citation omitted).

Accordingly, had the issue been submitted to the jury, it would have found that respondents engaged in conduct that posed a substantial risk of the use of physical force. As this Court recently explained, in the context of the ACCA's elements clause, the term "'physical force'" includes force that could "lead[] to relatively minor forms of injury," including "'hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling.'" *Stokeling*, 139 S. Ct. at 554 (interpreting 18 U.S.C. 924(e)(2)(B)(i)) (citation omitted). Respondents' conduct posed a substantial risk of force that far exceeded that threshold. Cf. *United States* v. *Parkes*, 497 F.3d 220, 232 (2d Cir. 2007) (noting that injury or death "is a natural consequence of a robbery which is premised on the use of overmastering force and violent armed confrontation"), cert. denied, 552 U.S. 1220 (2008). In light of respondents' actual

conduct during the course of their conspiracy, the jury would necessarily have found that the offense was a "crime of violence" under Section 924(c)(3)(B). Their convictions under Section 924(c)(3) should therefore be reinstated. At a minimum, the case should be remanded so that the government may retry respondents under proper jury instructions.

CONCLUSION

The judgment of the court of appeals should be reversed, or, alternatively, vacated and remanded with instructions to permit a retrial.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

3. 18 U.S.C. 922(g) provides in pertinent part:

Unlawful acts

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. 18 U.S.C. 924 (2012) provides in pertinent part:

Penalties

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with

any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prose-

cuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

5. 18 U.S.C. 1951 provides:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all

other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

No. 18-431

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MAURICE LAMONT DAVIS and ANDRE LEVON GLOVER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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March 14, 2019

QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)'s residual clause is—like the identical residual clause in § 16(b)—unconstitutionally vague because it requires an ordinary-case categorical approach to identifying a "crime of violence."

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INTRODUCTION

In *Sessions* v. *Dimaya*, the government all but conceded that the residual clauses in 18 U.S.C. §§ 16(b) and 924(c)(3)(B) must stand or fall together. It warned that invalidating § 16(b)'s "crime of violence" definition would imperil "the same statutory language" in § 924(c). Brief for the Petitioner 52–53, *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018) (No. 15-1498) [*Dimaya* U.S. Br.]. But the Court struck down § 16(b) because it required an ordinary-case categorical approach with "the same two features," "combined in the same constitutionally problematic way," as the ACCA residual clause the Court invalidated in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). See *Dimaya*, 138 S. Ct. at 1213; *Leocal* v. *Ashcroft*, 543 U.S. 1, 7 (2004). And the government now concedes that "construing Section 924(c)(3)(B) to incorporate an ordinary-case categorical approach"—as *Leocal* and *Dimaya* construed the same language in § 16(b)—"would render it unconstitutional." Br. 45.

It is time for the other shoe to drop. *Johnson* and *Dimaya* held that an ordinary-case categorical approach violates due process. *Leocal* and *Dimaya* held that § 16(b) requires that approach. And the government concedes, as it must, that § 924(c)'s residual clause is "materially identical" to § 16(b). *Dimaya* U.S. Br. 53; see also Br. 32. That should be the end of this case.

Even so, the government argues that § 924(c)'s residual clause should be read differently from § 16(b). In fact, it says § 924(c)'s residual clause is "best read to require a circumstance-specific inquiry by the jury" into "the 'risk[iness]' of the defendant's actual conduct." Br. 20, 26 (alteration in original) (initial capitals omitted).

No one thinks that is the best reading of § 924(c)'s residual clause. The government does not really think so; it accepted a categorical reading of § 924(c) for "many years." Br. 22, 33, 39. The courts of appeals do not think so; they swiftly settled on a categorical reading of both § 16(b) and § 924(c) based on the plain language of these identical provisions, and maintained that consensus for three decades. Congress does not think so; despite often amending § 924(c) to override judicial decisions it disagrees with, it has not changed a word in § 924(c)'s residual clause since 1986. And this Court does not think so. It held unanimously that § 16(b)'s identical text "requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts [of the defendant's] crime," *Leocal*, 543 U.S. at 7, reiterating just last Term that this language "has no 'plausible' fact-based reading," *Dimaya*, 138 S. Ct. at 1218 (plurality).

The reason for the government's analytical contortions is obvious: It does not like the "practical consequences" of striking down the residual clause. Br. 49. But even if that were a proper reason to uphold an unconstitutional statute, the government's scaremongering is unjustified. Most § 924(c) defendants are convicted under the drug-trafficking or elements clauses. This case will not affect those prosecutions. Even defendants charged under the residual clause will not simply go free. By definition, a § 924(c) defendant is already "subject to punishment for" his predicate offense. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). And without a § 924(c) charge, that punishment will often be enhanced, under the Sentencing Guidelines, for weapons use. In fact, the government's own cases show that many defendants could receive the same sentence without the

§ 924(c) conviction. In all events, if this Court invalidates the current residual clause, Congress will be free to adopt a new one that does not offend the Constitution.

There is thus no reason for this Court to join the government in trying to distinguish § 924(c) from § 16(b). Congress gave these laws the same language to serve the same function, and has never seen fit to distinguish them. As one goes, so goes the other.

STATEMENT OF THE CASE

A grand jury returned an indictment charging Maurice Davis and Andre Glover with a series of gas station robberies. 5th Cir. Record on Appeal (ROA) 1148–1160.[1] This case focuses on Count One, conspiracy to commit robbery in violation of the Hobbs Act, and Count Two, violating § 924(c) by brandishing a short-barreled shotgun in furtherance of Count One. Count Two alleged that the conspiracy charged in Count One was a crime of violence, but did not allege that the conspiracy was committed in a way that risked the use of physical force. See ROA 1152. Counts Three through Six charged three robberies; Count Seven charged a separate § 924(c) violation for brandishing a short-barrel shotgun in furtherance of one of those robberies. Count Eight charged Mr. Davis with being a felon in possession of a firearm.

Before trial, Respondents moved to dismiss the § 924(c) charges because—like the ACCA's residual clause—§ 924(c)'s residual clause requires an ordinary-case categorical approach that cannot be applied constitutionally. ROA 1245–1253. Their motion relied on the well-settled view that § 16(b) calls for an ordi-

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1 In citing the Fifth Circuit record, this brief uses the record pagination assigned to Mr. Davis's appeal.

nary-case categorical approach. ROA 1248–1250. The government did not disagree. Instead, it relied on *Leocal* to argue that § 924(c)'s residual clause is narrower than the ACCA's residual clause, and not vague, because § 924(c) "does not go beyond the elements of the offense." ROA 1259. The district judge took the motion under advisement until sentencing, ultimately denying it. Pet. App. 19a, 22a.

While the motion was still pending, the government submitted an agreed proposed jury charge asking the court to instruct the jury that conspiracy to commit robbery was a "crime of violence" under § 924(c). ROA 1298–1300. The district court agreed, instructing the jury that both robbery and conspiracy to commit robbery were categorically crimes of violence. ROA 1361. The jury therefore had no opportunity to decide, and Respondents had no opportunity to address, whether this particular conspiracy presented a substantial risk of the use of force.

Based on those instructions, the jury convicted Respondents of both § 924(c) counts. ROA 1368–1371. Mr. Glover was convicted of three robbery counts; Mr. Davis was acquitted of one but convicted of two. ROA 1368–1371. Mr. Davis was also convicted of being a felon in possession of a firearm. ROA 269–272, 1392–1394. At the time, the combined effect of the two § 924(c) convictions was a mandatory minimum of 35 years in prison, consecutive to any other sentence.[2] See § 924(c)(1)(B)(i), (C)(i), (D)(ii). In total, Mr. Davis was sentenced to over 50 years' imprisonment and two years of supervised release, and Mr. Glover was sentenced to over 41 years' imprisonment and two

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2 Respondents reserve the right to invoke Congress's December 2018 clarification to § 924(c) in the event Count Two is reinstated. *Cf.* Br. 8–9 & n.1.

years of supervised release. ROA 270, 1393. Without the convictions on Count Two, Count Seven would carry a minimum of ten years in prison.

On appeal, Respondents again argued that § 924(c)'s residual clause is unconstitutionally vague. Pet. App. 12a–13a. Mr. Glover argued alternatively that the jury should decide whether a predicate offense is a § 924(c) "crime of violence." The government responded that Mr. Glover *invited* any error because he joined the agreed proposed jury charge, and that he should not be allowed to "speculat[e] on a verdict, and then, when the speculation turns out badly, escap[e] the consequence of having done so." U.S. 5th Cir. Br. 26–29 (internal quotation omitted). The government also argued that "it was not error at all" to apply the categorical approach: "whether a predicate offense is a crime of violence is 'a question of law that should not be submitted to the jury.'" *Id.* at 28. And the government insisted that the vagueness analysis for § 924(c) must be the same as for § 16(b), since the two laws use "precisely the same language," and "the same language either is or is not unconstitutionally vague." *Id.* at 24.

The Fifth Circuit affirmed the convictions. Pet. App. 12a–14a. Respondents then sought review in this Court, which vacated the Fifth Circuit's decisions and remanded for further consideration in light of *Dimaya*. 138 S. Ct. 1979 (2018).

When Respondents renewed their vagueness claim on remand, the government changed its position. It abandoned its "longstanding" view that § 924(c)'s residual clause demands an ordinary-case categorical approach and urged the Fifth Circuit to adopt "a new 'case specific' method" which would "compare § 924(c)'s residual definition to the 'defendant's actual conduct.'" Pet. App. 4a. The court rejected that invita-

tion as foreclosed by binding circuit precedent and held that § 924(c)(3)(B) is, like § 16(b), unconstitutionally vague. *Id.* at 5a. Because conspiracy could qualify as a "crime of violence" only under the residual clause, *id.* at 4a, the Fifth Circuit vacated Respondents' convictions on Count Two, *id.* at 6a. Judge Higginbotham concurred in the vacatur, but dissented in part because the majority did not order resentencing. *Id.* at 7a–9a. After Respondents moved for panel rehearing, the government agreed that they should be resentenced on all counts. See Response of the United States to Appellants' Petitions for Panel Rehearing 10.

SUMMARY OF ARGUMENT

I. Every tool of statutory interpretation shows that the government's fact-based reading of § 924(c)'s residual clause is not plausible. This provision can only be read, like § 16(b), to require an ordinary-case categorical approach. And the government concedes that, so read, it is unconstitutional. Br. 45.

A. The § 924(c) residual clause is, apart from a single comma, identical to § 16(b). Its text thus demands the same ordinary-case categorical approach the Court applied in *Leocal* and *Dimaya*.

1. The phrase "offense that is a felony" must refer generically to the offense as defined by Congress. This reading is consistent with ordinary usage. The government's view, by contrast, would give this single statutory phrase two different meanings at once: It would refer to an "offense" categorically when introducing the elements clause, but would refer to brute facts for the residual clause. This Court has "forcefully rejected" "such interpretive contortion." *United States* v. *Santos*, 553 U.S. 507, 522 (2008) (plurality); *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005).

The phrase "by its nature" similarly compels a categorical approach. "Nature" means "normal and characteristic quality" or "basic or inherent features." This phrase thus "tells courts to figure out what an offense normally—or, as we have repeatedly said, 'ordinarily'—entails." *Dimaya*, 138 S. Ct. at 1217–18 (plurality). The government's reading cannot be squared with this definition; a defendant's specific actions on one occasion have no "characteristic" or "inherent" qualities. The government's approach thus deprives this statutory language of any meaning. The government's proof-of-concept jury instructions confirm this problem: All but one *omit* "by its nature" entirely, and the last makes no effort to explain to the jury how to apply this language.

The statute's remaining language bolsters this reading. Section 924(c)(1)(A) refers to "a crime of violence ... *that provides for* an enhanced punishment." Statutory offenses, not case-specific facts, "provide for" punishment. Indeed, the entire structure of § 924(c) contemplates a categorical inquiry; "drug-trafficking crime[s]" and the elements clause both apply categorically. It is only natural to read the residual clause the same way. And the statute does not use the sort of specific language this Court has read in other cases to require a fact-based inquiry. That the statute requires a risk determination does not suggest a fact-based approach.

2. "This Court's precedents interpreting identical statutory language positively compel" a categorical approach. *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1567 (2016). This Court has twice read § 16(b)'s identical language to require an ordinary-case categorical approach. *Dimaya*, 138 S. Ct. at 1217 (plurality); *Leocal*, 543 U.S. at 7, 12 n.8. The same text requires the same result here.

B.1. Section 924(c)'s residual clause and § 16(b) are identical twins, created by Congress at the same time to serve the same purpose with the same meaning. Section 924(c) originally applied to any federal felony. In 1984, Congress "narrow[ed]" it to reach only the newly created category of "crime[s] of violence." S. Rep. No. 97-307, at 888–89 (1981). Section 924(c) did not define "crime of violence," but cross-referenced § 16's definition.

The courts quickly settled on a categorical reading of § 924(c) that excluded drug trafficking, since such an offense does not *by its nature* involve a sufficient risk of violence. Congress in 1986 abrogated these decisions—but *not* by changing the "crime of violence" definition. Instead, it added "drug trafficking crime" as a separate categorical predicate and copied-and-pasted § 16's "crime of violence" definition into § 924(c)(3)—knowing that courts had construed it categorically. Congress thus readopted that approach for § 924(c). *E.g.*, *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. 573, 590 (2010).

2. Over the next three decades, "the considered circuit consensus [was] that § 924(c)(3)(B) requires an ordinary-case categorical approach." *United States* v. *Simms*, 914 F.3d 229, 249 (4th Cir. 2019) (en banc). Yet Congress has never changed § 924(c)'s "crime of violence" definition, even though it has often amended the statute. The "very strength of this consensus" among the circuits, combined with "congressional silence after years of judicial interpretation," confirms that the categorical approach is correct. *Gen. Dynamics Land Sys., Inc.*, v. *Cline*, 540 U.S. 581, 593–94 (2004).

C. The government nevertheless argues that § 924(c) should be interpreted differently from § 16(b). It says the categorical approach developed to address practical and constitutional concerns arising in the *prior*-conviction context, and since those same concerns do not apply in the *present*-offense context, the categorical approach should give way to the "more workable" fact-based approach. Br. 39–42.

This argument stretches the principle of contextual interpretation too far. Words have meaning, and the detailed 34-word residual clause is not the sort of "utterly unremarkable phrase" Congress often uses to mean different things in different contexts. See *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1634 (2015). The government's request would be unprecedented.

The government's argument also fails on its own terms. The lower courts adopted the categorical approach to § 16(b) and § 924(c) because that is what the text requires. This Court, too, has "consistently understood *language* in the residual clauses of both ACCA and § 16 to refer to 'the statute of conviction, not to the facts of each defendant's conduct.'" *Dimaya*, 138 S. Ct. at 1217 (plurality) (emphasis added).

The categorical approach also preserves Congress's decision in 1984 to narrow § 924(c)'s scope from all federal felonies to only "crimes of violence." Under the government's fact-based reading, by contrast, § 924(c) could again reach any federal felony based on the facts of the case—including the presence of the gun. Every federal felony could thus become a "crime of violence," regardless of its "nature." The government's reading would therefore undo Congress's work and would subject even legal gun owners to potential § 924(c) liability if they committed a federal crime in a risky manner.

II. The government's appeal to constitutional avoidance is misplaced. Avoidance is a means of choosing between multiple "plausible construction[s]." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 842 (2018). But the residual clause's language is unambiguous, *Leocal*, 543 U.S. at 11 n.8, and it has no plausible fact-based reading, *Dimaya*, 138 S. Ct. at 1217–18 (plurality). If avoidance could not save § 16(b), it cannot save § 924(c)'s residual clause either.

A. Contrary to the government's dire warnings, striking down § 924(c)'s residual clause will not prevent violent criminals from being punished. A vagueness ruling would not imperil convictions under the drug-trafficking or elements-clause predicates. Only a small proportion of defendants could avoid § 924(c) liability without the residual clause. Moreover, every potential § 924(c) defendant is also "subject to punishment for" the predicate offense. *Rodriguez-Moreno*, 526 U.S. at 280. That punishment must account for the "nature" *and* "circumstances" of the crime, see § 3553(a)(1), "which will necessarily include whether the offender used a firearm," *Simms*, 914 F.3d at 253.

B. While a vagueness holding would not seriously impair the government's use of § 924(c), the government's new fact-based approach would expand the crime beyond all recognition. Divorced from the predicate crime's elements, the § 924(c) offense would have no principled limits. Prosecutors could convince a jury that any felony, even a typically non-violent crime, was a "crime of violence" under the new approach. This surprising expansion of § 924(c) would make the crime far broader and even less predictable than it is now. Given the severity of § 924(c)'s penalties, this loss of notice and predictability is unacceptable.

C. Even if the § 924(c) residual clause were ambiguous, the Court "would be constrained" by the rule of lenity. *Leocal*, 543 U.S. at 11 n.8. The fact-based approach would dramatically expand § 924(c)'s reach while making its application in many cases even more uncertain. Adopting that approach would thus offend the constitutional principles of fair notice and separation of powers, which give rise to both the rule of lenity and the void-for-vagueness doctrine. As the Chief Justice has explained, a statute that may apply either categorically (and narrowly) or factually (and broadly) is "a textbook case" for lenity. *United States* v. *Hayes*, 555 U.S. 415, 436 (2009) (Roberts, C.J., dissenting). Lenity therefore bars the government's fact-based approach—whether or not avoidance would otherwise support it.

D. Adopting the government's view would require rewriting the statute. It is "for Congress, not this Court," to undertake that task. *Blount* v. *Rizzi*, 400 U.S. 410, 419 (1971). Avoidance is "a means of giving effect to congressional intent, not of subverting it." *Clark*, 543 U.S. at 382. There is ample evidence, both textual and historical, that Congress intends § 924(c) to apply categorically.

Avoidance is often used to narrow the reach of a statute when its outermost applications raise constitutional issues. It has never been used, however, to *expand* the reach of a criminal statute beyond what Congress mandated. Nor can it: Only Congress has the power to define federal crimes. Using avoidance to adopt the government's position would intrude on Congress's exclusive authority and arrogate to the judiciary the power to make criminal law.

III. However the statute is construed, Respondents' residual-clause convictions cannot stand. Respondents were indicted, tried, and convicted under the

categorical approach, which the government agrees is unconstitutional. Thus, neither the grand jury nor the trial jury found the new risk-based "element" the government's approach requires, and Respondents had no opportunity or incentive to contest that factual element. This situation causes multiple overlapping constitutional errors, which either are structural or cannot be deemed harmless on this record. And all of these problems arose because the government convinced the lower courts to apply the categorical approach. Having obtained Respondents' convictions on a concededly unconstitutional basis—and having prevented them from building a record to defend against its new theory—the government cannot preserve those convictions by changing positions after years of litigation.

ARGUMENT

I. THE § 924(c) RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE BECAUSE IT REQUIRES AN ORDINARY-CASE CATEGORICAL APPROACH.

The government concedes that "construing Section 924(c)(3)(B) to incorporate an ordinary-case categorical approach would render it unconstitutional." Br. 45. That concession is fatal, because the statutory text, structure, and history—not to mention this Court's precedents—all require an ordinary-case categorical approach. Section § 924(c)'s residual clause thus has the same "pair of features—the ordinary-case inquiry and a hazy risk threshold—that *Johnson* [and *Dimaya*] found to produce impermissible vagueness." *Dimaya*, 138 S. Ct. at 1218.

A. The statutory text requires an ordinary-case categorical approach, and no other reading is plausible.

Section 924(c)'s instruction to identify an "offense that is a felony" that "by its nature" involves a substantial risk that force "may be used" requires an ordinary-case categorical approach. This Court's precedents interpreting § 16(b)'s identical language confirm this straightforward reading.

1. The residual clause applies to an "offense that is a felony" that "by its nature" "may" present a risk of force.

"We begin, as always, with the text." *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1568 (2017). Section 924(c)(3) defines a "crime of violence" as

> an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Every aspect of this language requires a categorical, rather than a fact-based, inquiry.

a. The subject of the residual clause—"offense that is a felony"—refers generically to the statute the defendant has violated rather than his specific conduct. "Simple references to a ... 'felony,' or 'offense,' ... are 'read naturally' to denote the 'crime as *generally* committed.'" *Dimaya*, 138 S. Ct. at 1217 (plurality) (quoting *Nijhawan* v. *Holder*, 557 U.S. 29, 34 (2009)); see, *e.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 478

(2000) (using the phrase "felony offense" in this way). The phrase "offense that is a felony" thus directs a court "to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [a defendant's] crime." *Leocal*, 543 U.S. at 7.

The government argues that "offense" can also "refer to the specific acts in which an offender engaged on a specific occasion." Br. 26 (quoting *Nijhawan*, 557 U.S. at 33–34). In some contexts, perhaps. But not here. The single phrase "offense that is a felony" in § 924(c)(3) forms the subject of both the elements clause and the residual clause. And the government agrees that the elements clause refers to crimes categorically. Br. 26; see *Leocal*, 543 U.S. at 7–10. Because a fact-specific reading of "offense that is a felony" cannot apply to the elements clause, it cannot apply to the residual clause either: "[T]he statute's single reference to an 'offense that is a felony' has a single meaning: it refers to a crime as defined by statute." *Simms*, 914 F.3d at 242.

Any other interpretation would give this single statutory phrase "two contradictory meanings, depending on whether the force clause or the residual clause is in play." *Id.*; see Br. 27. But to "interpret" a statutory term "to mean [one thing] for some predicate crimes, [and another] for others" would require too much "interpretive contortion." *Santos*, 553 U.S. at 522 (plurality). Rather, the Court has "forcefully rejected" the idea of "giving the same word, *in the same statutory provision*, different meanings *in different factual contexts*." *Id.* (citing *Clark*, 543 U.S. at 378). To do so "would be to invent a statute rather than interpret one." *Clark*, 543 U.S. at 378.

b. The qualifying phrase "by its nature," which introduces the residual clause, likewise requires a cat

gorical inquiry. The natural reading of "by its nature"—in fact, the only reading that makes sense in context—is a reference to the defendant's offense in the abstract.

Because "by its nature" refers back to "offense," the "nature" a court must consider is that of the "offense that is a felony." See *Leocal*, 543 U.S. at 7. And because the "offense that is a felony" must be the offense as defined by Congress, "the use of the word 'nature' refers to a legal charge rather than its factual predicate." *United States* v. *Singleton*, 182 F.3d 7, 11 (D.C. Cir. 1999).

The plain meaning of "by its nature" confirms this reading. The government agrees (Br. 30) that an "offense's 'nature' means its 'normal and characteristic quality,'" *Dimaya*, 138 S. Ct. at 1217 (plurality), or its "basic or inherent features, character, or quality," OXFORD DICTIONARY OF ENGLISH 1183 (3d ed. 2010). The residual clause thus looks to "the basic or inherent features of 'an offense that is a felony,'" *Simms*, 914 F.3d at 241, "tell[ing] courts to figure out what an offense normally—or, as we have repeatedly said, 'ordinarily'—entails, not what happened to occur on one occasion," *Dimaya*, 138 S. Ct. at 1217–18 (plurality). Indeed, *Leocal* emphasized that § 16(b)'s use of "by its nature" "requires us to look to the elements ... of the offense of conviction." 543 U.S. at 7. The Court's opinion in *James* v. *United States* similarly used "by its nature" to describe the ACCA residual clause's categorical inquiry even though the ACCA does not contain those words. 550 U.S. 192, 209 (2007), *overruled by Johnson*, 135 S. Ct. 2551.

The government's fact-based reading of "by its nature," by contrast, does not fit with the ordinary meaning of these words. "[E]ither a crime is violent 'by its nature' or it is not. It cannot be a crime of vio-

lence 'by its nature' in some cases, but not others, depending on the circumstances." *United States* v. *Velazquez-Overa*, 100 F.3d 418, 420–21 (5th Cir. 1996).

The government acknowledges that this Court has read "by its nature" "as an indication that the definition of 'crime of violence'" in § 16(b) "requires a categorical approach." Br. 32. It says, however, that "the 'nature' of a prior conviction and the 'nature' of the [present] offense" are different: "the 'nature' of a prior conviction may be the legal determination" of guilt, while "the 'nature' of a current offense is the defendant's particular conduct." *Id.* But this argument begs the question by assuming that "the defendant's particular conduct" is the "offense that is a felony" to which § 924(c)'s residual clause refers. And the government is alone in seeing this distinction. The courts have consistently read § 924(c), and other provisions using the same language in the present-offense context, to require a categorical approach *precisely because* "'by its nature' relates to the *intrinsic* nature of the crime, not to the facts of each individual commission of the offense." *United States* v. *Aragon*, 983 F.2d 1306, 1312 (4th Cir. 1993); see *Simms*, 914 F.3d at 249 & n.13 (collecting cases); *infra* pp. 26–27, 29–30, 31. In any context, past or present, "the use of the term 'by its nature' ... mandates a categorical approach." *United States* v. *Rogers*, 371 F.3d 1225, 1228 n.5 (10th Cir. 2004).

Moreover, the government's fact-specific reading of "by its nature" deprives this statutory phrase of any meaning. The government asserts that a jury must consider the "nature" of "the defendant's particular conduct." Br. 30. But an individual defendant's "particular conduct" on one occasion has no "normal and characteristic" or "inherent features." There are simply the facts of the defendant's actions. Cf. § 3553(a)(1)

(treating an offense's "nature" and "circumstances" as distinct concepts). Thus, reading "by its nature" to refer merely to the defendant's conduct renders this language superfluous. With or without "by its nature," the court would simply focus on the facts of the defendant's crime. *Simms*, 914 F.3d at 242.

The observation that "[t]wo violations of the same criminal statute can have very different natures" (Br. 31), does not help the government. That is just another way of saying that two different violations of a law can have very different *facts*, which simply underscores that the government's reading of "by its nature" does no work. The government's interpretation thus violates the "axiomatic" rule against surplusage: All of a statute's language must be given effect. *Corley* v. *United States*, 556 U.S. 303, 314 (2009). Indeed, all but one of the jury instructions the government cites—in an attempt to show that its fact-specific approach is workable—*omit* the phrase "by its nature" in describing the offense, and the last makes no effort to explain it. Add. 3a, 8a, 12a, 16a–17a. One set of instructions actually replaces "by its nature" with "as committed." *Id.* at 3a. This further confirms that, under the government's reading, "by its nature" has no meaning.

The government tries to solve this problem by suggesting that "the focus on the 'nature' of the crime has the practical effect of limiting the jury's inquiry to the *offense*, rather than the *offender*, or any other extraneous considerations." Br. 31. Thus, evidence of prior violent crimes or acts—or evidence of a "peaceful nature"—is not part of the inquiry. *Id.* But the risk inquiry is already limited to "the course of committing" the "offense that is a felony." See *Dimaya*, 138 S. Ct. at 1218–19. No more language is needed to preclude extraneous considerations, or to exclude evi-

dence that our legal system generally treats as "not admissible." See Fed. R. Evid. 404(a)(1), (b)(1). And again, if "by its nature" really "limit[ed] the jury's inquiry" under the fact-specific approach (Br. 31), presumably this phrase would not have been left out of the government's jury instructions.

c. The categorical reading also finds support in § 924(c)(1)(A), which outlines the elements of a § 924(c) violation. It refers expressly to "a crime of violence ... *that provides for* an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." § 924(c)(1)(A) (emphasis added). "This phrasing would make no sense under a conduct-specific definition of 'crime of violence,' as only statutes, not conduct-specific facts, can 'provide[ ] for' an amount of punishment." *Simms*, 914 F.3d at 242 & n.7 (alteration in original).

It is no surprise that § 924(c)(1)(A) uses categorical language. The other two types of § 924(c) predicates—drug-trafficking crimes and elements-based crimes of violence—are identified categorically. Br. 21, 26. It would be strange for Congress to draft a three-prong statute that uses categorical language throughout—including to describe all three prongs and the offense itself—if it intended one prong to require a fact-specific reading. Indeed, "we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with [§ 924(c)(3)'s] emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a *category of violent, active crimes* ...." *Leocal*, 543 U.S. at 11 (emphasis added). The statute's surrounding language thus counsels against a "circumstance-specific" reading of the residual clause, under which *any* federal felony could be a "crime of violence"

based on "'the specific way' in which [that] crime was committed" rather than the "nature" of the offense itself. Br. 20.

d. The § 924(c) residual clause also omits the specific references to real-world facts and circumstances that Congress typically uses to instruct courts to assess risk based on the case's facts. "If Congress had wanted judges to look into a felon's actual conduct, 'it presumably would have said so; other statutes, in other contexts, speak in just that way.'" *Dimaya*, 138 S. Ct. at 1218 (plurality); see, *e.g.*, § 2332b(a)(1)(B) (punishing "[w]hoever, involving conduct transcending national boundaries ... creates a substantial risk of serious bodily injury ...."). The Court "usually 'presume[s] differences in language like this convey differences in meaning.'" *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2071 (2018).

This lack of fact-specific language also distinguishes *Nijhawan* and *Hayes*. See Br. 26–27. The government points out that both cases construed statutes that used the word "offense" to require a fact-specific inquiry. *Id.* That is not quite right. *Nijhawan* interpreted an immigration statute addressing offenses "involv[ing] fraud or deceit in which the loss to the victim or victims exceeds $10,000." 557 U.S. at 38 (emphasis omitted) (quoting 8 U.S.C. § 1101(a)(43)(M)(i)). *Hayes* construed a criminal statute addressing offenses that had certain elements and were "committed by" a particular set of people with specified relationships to the victim. 555 U.S. at 424 (quoting 25 U.S.C. § 2803(3)(C)). As the Court construed these laws, both required a hybrid inquiry: The *Hayes* statute required that any covered offense have a certain "element," and the *Nijhawan* statute applied only to "fraud or deceit" offenses. Those are both abstract, categorical inquiries. The question in

those cases was whether the statutes' *additional* qualifying language required a fact-specific inquiry as to that requirement alone. See *Nijhawan*, 557 U.S. at 34; *Hayes*, 555 U.S. at 421. But no such qualifying language is found here. *Simms*, 914 F.3d at 244–45. And only a categorical reading gives effect to § 924(c)'s full text—especially "by its nature," which did not appear in the statutes discussed in *Nijhawan* and *Hayes*.

e. The government's other statutory arguments are unavailing. The government explains at length that juries are "well-positioned" to determine risk. Br. 20–25. Thus, the government says, "Section 924(c)(3)(B)'s 'substantial risk' requirement suggests a jury question." Br. 20. But the fact that juries *can* make such assessments does not mean every reference to risk is an invitation for a jury trial. This Court has repeatedly interpreted similar or identical language to require *judges* to gauge risk, and the government cannot contend that § 924(c)'s language is any more suggestive of a jury question. That other, differently worded laws require juries to "gaug[e] the riskiness of conduct" (Br. 23) is irrelevant. The question is whether Congress required the same inquiry here, and § 924(c)'s language shows that it did not.

The government's reliance on the word "involves"—"that by its nature, *involves* a substantial risk"—is equally misplaced. The word "involves" no more "supports a circumstance-specific approach" here (Br. 27) than it did in the ACCA's residual clause or § 16(b), which both use the word "involves" "identically." *Dimaya*, 138 S. Ct. at 1216–17 (plurality). The government observes that *Taylor* "pointed to the word's *absence* as one reason to adopt a categorical, rather than circumstance-specific, approach" to identifying a prior *burglary* conviction. Br. 29. But "involves" did

not give the Court pause in construing the ACCA's residual clause and § 16(b) to require an ordinary-case categorical approach, *e.g.*, *James*, 550 U.S. at 208; *Leocal*, 543 U.S. at 7, and those holdings are far more relevant.

If anything, the residual clause's present-tense use of such abstract language—"*involves* a substantial risk that physical force against the person or property of another *may be* used"—suggests a categorical inquiry. Compare this language with a bill pending in Congress, which would amend § 924(c)'s residual clause by striking "by its nature," replacing "involves" with "based on the facts underlying the offense, involved," and replacing "may be used" with "may have been used." H.R. 7113, 115th Congr. (2d. Sess. 2018). *This* kind of fact-specific language—absent from the actual statute—would be needed to permit the government's reading.

Finally, the phrase "in the course of committing the offense" does not help the government. The government argues that this phrase suggests a focused inquiry into "the defendant's *own* violation of a legal prohibition, rather than just the legal prohibition in the abstract." Br. 26. The problem with this argument is the same as when the government raised it in *Dimaya:* The phrase "in the course of committing the offense" simply "excludes ... a court's ability to consider the risk that force will be used after the crime has entirely concluded." 138 S. Ct. at 1218–19. It does not change the approach: "In the ordinary case, the riskiness of a crime arises from events occurring during its commission, not events occurring later." *Id.* at 1219. And this is not the "focus[]" of the residual clause (Br. 26); the "offense that is a felony" is.

At bottom, each word or phrase the government invokes—except "by its nature"—*might* be susceptible,

by itself, to a fact-specific reading. But § 924(c) uses all of these terms together. And this Court has twice construed this same language categorically.

2. The Court has twice interpreted § 16(b)'s identical language to unambiguously require an ordinary-case categorical approach.

Even if the text alone did not mandate an ordinary-case categorical approach, "[t]his Court's precedents interpreting identical statutory language [would] positively compel that conclusion." *Merrill Lynch*, 136 S. Ct. at 1567. This Court has twice read § 16(b), which the government admits is "materially identical" to § 924(c)'s residual clause (*Dimaya* U.S. Br. 53), to unambiguously require an ordinary-case categorical analysis. Those decisions apply fully here. As the government originally told the Fifth Circuit, there is "no reasoned basis" to distinguish "precisely the same language" in § 16(b) and § 924(c). U.S. 5th Cir. Br. 24.

Leocal unanimously adopted the ordinary-case categorical approach for § 16(b). The Court emphasized the same textual features discussed above, explaining that the phrases "*any other offense*" and "*by its nature*" "require[ ] us to look to the elements and the nature of the offense of conviction, rather than to the particular facts [of the defendant's] crime." 543 U.S. at 7. Indeed, *Leocal* "considered [§ 16(b)] clear and unremarkable." *Dimaya*, 138 S. Ct. at 1235 (Roberts, C.J., dissenting); see *Leocal*, 543 U.S. at 11 n.8 (noting the statute's lack of "ambiguity"). That is unsurprising, since the courts of appeals and the government had long read this language to require a categorical approach wherever it appeared. Br. 22; *infra* pp. 26–27, 29–30, 31.

Dimaya confirms *Leocal*'s reading of this language. Even "more so" than the ACCA residual clause, § 16(b) "demands a categorical approach." 138 S. Ct. at 1217 (plurality). *Dimaya* again pointed to the same textual characteristics: Words like "felony" and "offense "are 'read naturally' to denote the 'crime as *generally* committed,'" and "the words 'by its nature' in § 16(b) make that meaning all the clearer" by "tell[ing] courts to figure out what an offense normally—or, as we have repeatedly said, 'ordinarily'—entails, not what happened to occur on one occasion." *Id.* at 1217–18. This reading is also confirmed by "the absence of terms alluding to a crime's circumstances, or its commission." *Id.* "The upshot of all this textual evidence is that § 16's residual clause—like ACCA's, except still more plainly—*has no 'plausible' fact-based reading*." *Id.* (emphasis added).

Both decisions built on *Taylor* v. *United States*, which first applied the categorical approach to the ACCA's enumerated offense of "burglary." 495 U.S. 575, 600 (1990). *Taylor* noted that Congress considered adopting for the ACCA the same "crime of violence" definition that § 924(c) uses, *id.* at 583, and emphasized that "[e]ach of the proposed versions of the 1986 amendment"—including this one—"carried forward th[e] categorical approach," *id.* at 589. *Leocal* was then followed by *James*, which applied the ordinary-case categorical approach to the ACCA's residual clause, reiterating that "the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." 550 U.S. at 208.

Because § 924(c)'s language is the same as § 16(b)'s, this Court should interpret both provisions the same way. "[W]hen Congress uses the same language in two statutes having similar purposes, particularly

when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005). That principle applies with full force here. Apart from a comma before "by its nature," § 16(b) is exactly the same as § 924(c)'s residual clause. "The relevant statutory phrases, moreover, play an identical role in the structure common to [both] statutes ...." *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2519, (2015). And these two provisions share not only language, but also lineage. As explained next, they are identical twins, enacted at the same time to serve the same function.

B. The statute's history confirms that Congress intended a categorical approach.

Section 924(c)'s and § 16(b)'s shared history shows that Congress (1) intended both of these twin provisions to apply categorically, and (2) has accepted the court of appeals' three-decade-old consensus that § 924(c) requires a categorical approach.

1. Congress intentionally conjoined, not separated, § 16 and § 924(c).

Congress first enacted § 924(c) in 1968. Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1223–24. At the time, § 924(c) contained neither a definition of "crime of violence" nor a residual clause; instead, it criminalized using a firearm to commit, or unlawfully carrying a firearm while committing, a federal felony. *Id.*

That changed in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837. Three aspects of that law are relevant. First, Congress created the earliest version of the ACCA. *Id.* § 1801, 98 Stat. at 2185. Second, Congress created a general def-

inition of "crime of violence" in § 16, and repeated it in the Bail Reform Act. That definition was the same as the current one. Third, Congress narrowed § 924(c) to apply only to this new category of "crime[s] of violence." *Id.* § 1001(a), 98 Stat. at 2136; see S. Rep. No. 97-307, at 888 (the bill would "narrow[ ]" § 924(c) by "limiting the offenses with which the display, use, or possession of a firearm must be associated to crimes of violence rather than any felony"). "These limitations ... [were] designed to refine the offense by confining it to its proper and practical boundaries as a means of deterring and punishing the employment of a firearm in relation to an offense that, by its nature, involves physical force or a substantial risk thereof." S. Rep. No. 97-307, at 889. But Congress did not define "crime of violence" in § 924(c). Instead, § 924(c) cross-referenced § 16's definition. See Pub. L. No. 98-473, § 1001(a), 98 Stat. at 2136; S. Rep. No. 98-225, at 307 (1983).[3]

Thus, from inception, the definitions of "crime of violence" in § 924(c) and § 16 were conjoined by cross-reference, created in the same bill to serve the same function. And these changes were part of the same law that first created the ACCA, the legislative history of which "shows that Congress generally took a categorical approach to predicate offenses." *Taylor*, 495 U.S. at 601. The government, by contrast, points to nothing in the legislative history suggesting that

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3 The government quotes the 1981 Senate Judiciary Committee Report's use of the phrase "dangerous criminal conduct," Br. 35, but that snippet comes from the section of the report describing "Present Federal Law," which referred to the earliest version of § 924(c). S. Rep. No. 97-307, at 887–88. That pre-amendment version applied to any federal felony and did not use the term "crime of violence." *See id.*

Congress contemplated juries identifying predicate offenses.

At the time, the multi-purpose "crime of violence" definition referred mainly to contemporaneous offenses. For example, the Bail Reform Act required (and still requires) a district court to hold a hearing before releasing a defendant "in a case that involves ... a crime of violence." § 3142(f)(1)(A). Similarly, the Attorney General could certify a juvenile for adult prosecution where "the offense charged is a crime of violence that is a felony." Pub. L. No. 98-473, § 1201(a), 98 Stat. at 2150 (amending § 5032). And various criminal statutes incorporated the definition as an element of a present offense. Section 929 punished using or carrying a gun "loaded with armor piercing ammunition" during a crime of violence, *id.* § 1006(a), 98 Stat. at 2139, and § 1952A prohibited racketeers from "threaten[ing] to commit a crime of violence against any individual," *id.* § 1002(a), 98 Stat. at 2137.

The lower courts quickly converged on a categorical reading of these provisions. True, the government "argued in several Section 924(c) cases" in 1985 and 1986 that § 16(b) "required a circumstance-specific approach." Br. 36. But those arguments failed. The courts instead held that § 16(b)'s language, "including the phrase 'by its nature,' prevents us from adopting a case-by-case analysis." *United States* v. *Cruz*, 805 F.2d 1464, 1469 (11th Cir. 1986); see also *United States* v. *Meyer*, 803 F.2d 246, 249 (6th Cir. 1986) (adopting a categorical reading because "Section 924(c) applies to an offense that 'by its nature' involves a substantial risk of physical force"); *United States* v. *Chimurenga*, 760 F.2d 400, 404 (2d Cir. 1985) (same, for the Bail Reform Act); *United States* v. *Bushey*, 617 F. Supp. 292, 299 (D. Vt. 1985) ("Sec-

tion 16(b), in defining crimes of violence, speaks of crimes that *by their nature* involve a substantial risk of harm, not crimes which involve such a risk when conducted in a particular manner."). On that basis, the courts held that drug offenses were not crimes of violence. *E.g.*, *United States* v. *Diaz*, 778 F.2d 86, 88 (2d Cir. 1985) (per curiam) ("While the traffic in drugs is often accompanied by violence, it does not by its nature involve substantial risk that physical violence will be used.").

Responding to these decisions, Congress in 1986 expanded § 924(c) to include "drug trafficking crime[s]" as a separate category of predicate offenses. Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 449, 456–57 (1986); see 132 Cong. Rec. E1390-02 (1986) (discussing the amendment as a response to *Diaz* and similar cases); 131 Cong. Rec. S16903-03 (1985) (same). Unlike with crimes of violence, there was no general definition of "drug trafficking crime" in the U.S. Code, so Congress had to create one in § 924(c). 100 Stat. at 456–57. Then, rather than have one definition and one cross-reference, Congress copied § 16's "crime of violence" definition into § 924(c), creating the current § 924(c)(3). See *id.* There have been no more changes to the definition of "crime of violence"—in § 924(c), § 16, the Bail Reform Act, or any other statute—since.[4]

The government's conclusion from this history—that "Congress intentionally separated Section

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4 The government emphasizes the 1983 Senate Report's description of the residual clause as reaching "any felony which carries a substantial risk of such force." Br. 36. But the word "carries" is more suggestive of a categorical approach than a factual one. *E.g.*, *Dean* v. *United States*, 137 S. Ct. 1170, 1174 (2017) (§ 924(c)'s "separate firearm offense carries a mandatory minimum sentence").

924(c)(3)(B)'s subsection-specific definition of 'crime of violence' from" § 16's identical definition (Br. 34)—is exactly backwards. Yes, Congress abrogated the early decisions that applied a categorical approach to exclude drug trafficking from § 924(c)'s scope. Br. 36–37. But rather than change the definition of "crime of violence" to reject the courts' categorical reading, Congress added a separate provision to reach drug offenses and *retained* the existing "crime of violence" definition verbatim (minus a comma). It simply moved the operative definition from § 16(b) directly into § 924(c), lock, stock, and barrel.

It would be bizarre for Congress to "intentionally separate" the meaning of two previously cross-referenced statutes by copying the text of one into the other. If Congress thought the courts' interpretation of § 16(b) should not apply to § 924(c), the natural response would be to give § 924(c) different language. Instead, it borrowed § 16's existing language for § 924(c), knowing that this language had been interpreted categorically. This "repetition of the same language in a new statute indicates" Congress's "intent to incorporate" the existing "judicial interpretations as well." *Jerman*, 559 U.S. at 590 (holding that when "Congress copied verbatim" the language of TILA's bona-fide-error defense into the FDCPA, it incorporated the interpretation adopted by "three Federal Courts of Appeals"). Language "transplanted from ... other legislation ... brings the old soil with it." *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

2. Congress has accepted the courts of appeals' three-decade consensus that § 924(c) applies categorically.

The government's historical argument also neglects the intervening three decades, during which the lower courts continued to apply § 924(c)'s residual clause categorically. From 1984 until last year, "the considered circuit consensus [was] that § 924(c)(3)(B) requires an ordinary-case categorical approach." *Simms*, 914 F.3d at 249. In fact, prior to *Dimaya*, every circuit to address the issue had applied a categorical approach, often for many years. See *id.* at 249 & n.13 (collecting cases); *United States* v. *Butler*, 496 F. App'x 158, 161 & n.4 (3d Cir. 2012); *United States* v. *Jackson*, 865 F.3d 946, 952 (7th Cir. 2017), *vacated*, 138 S. Ct. 1983 (2018).

Yet Congress has never changed § 924(c)'s residual clause, or any part of its "crime of violence" definition. That is true even though Congress has not been shy about correcting "drafting problems and [judicial] interpretations" of § 924(c) with which it disagrees. See S. Rep. No. 98-225, at 312 (1983). As recently as December 2018, Congress adopted a "clarification of Section 924(c)" in response to how courts and prosecutors were stacking § 924(c) counts. First Step Act of 2018, Pub. L. No. 115-391, § 403 (capitalization omitted). But the residual clause remains the same—and Congress has reused the same language in other contexts, including the federal three-strikes law, § 3559(c)(2)(F)(ii), and for block-grant programs, 34 U.S.C. §§ 10596(2)(B), 10613(b)(2), 10651(a)(8).

Given "the well-nigh unanimous view of the federal courts reiterated for over thirty years," during which time § 924(c) "was amended [often] without alteration of the" residual clause, it is clear that "the construction adopted by the courts has been acceptable to the

legislative arm of the government." *Manhattan Props., Inc.* v. *Irving Tr. Co.*, 291 U.S. 320, 336 (1934). The "very strength of this consensus is enough to rule out any serious claim of ambiguity, and congressional silence after years of judicial interpretation supports adherence to the traditional view." *Gen. Dynamics Land Sys., Inc.*, 540 U.S. at 593–94 (relying on lower courts' "virtually unanimous accord").

C. The categorical approach applies equally in the present-offense context.

The government nevertheless argues that § 924(c) should be interpreted differently from § 16(b) because, unlike § 16(b), § 924(c) "applies only to the conduct for which the defendant is currently being prosecuted." Br. 14. That argument fails.

1. The government's position stretches the principle of contextual interpretation too far. Context surely matters; even "identical language may convey varying content" based on context. *Yates* v. *United States*, 135 S. Ct. 1074, 1082 (2015) (plurality). But that principle has limits. "Up" cannot mean "down," no matter the context. And the 34-word residual clause is not the sort of "utterly unremarkable phrase" Congress often uses to mean different things in different contexts. See *Kwai Fun Wong*, 135 S. Ct. at 1634; *Yates*, 135 S. Ct. at 1082 (plurality) (collecting examples of short phrases the Court has construed differently based on context, like "age," "employee," and "arising under"). The residual clause's language appears just eight times in the U.S. Code, always in provisions defining "crime of violence" or related terms like "nonviolent offense" or "violent offender." This detailed statutory provision is not a "chameleon" that "must draw its meaning from its context." See *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010). Indeed, the government has not cited a single case where this

Court interpreted identical statutory provisions of this length and detail differently.

2. The government's contextual argument also fails on its own terms. That argument has three components: (1) the categorical approach developed to address practical and constitutional concerns arising in the prior-conviction context; (2) courts then applied that approach under § 924(c) essentially by accident, thanks to the "cross-pollination of circuit law"; and (3) because those concerns are irrelevant here, the categorical approach should give way to the "more workable" fact-based approach. Br. 39–42.

The first two claims fail given the history discussed above. The courts of appeals began applying the categorical approach in § 924(c) cases soon after the 1984 amendments adopted the term "crime of violence." *E.g.*, *Cruz*, 805 F.2d at 1474; *Meyer*, 803 F.2d at 249; *Diaz*, 778 F.2d at 88. They did the same in cases under the Bail Reform Act. *E.g.*, *Chimurenga*, 760 F.2d at 404. And they continued to do so under these statutes and § 16(b) after the 1986 amendments. *E.g.*, *Aragon*, 983 F.2d at 1312; *United States* v. *Springfield*, 829 F.2d 860, 862–63 (9th Cir. 1987), *abrogated on other grounds by United States* v. *Benally*, 843 F.3d 350, 353–54 (9th Cir. 2016)); cf. *United States* v. *Headspeth*, 852 F.2d 753, 759 (4th Cir. 1988). These cases involved the defendant's *present* offense, and thus raised no concerns about classifying prior convictions. And these courts adopted the categorical approach based on "the language of the statute, its legislative history, [and] the structure of the statute as a whole." *Cruz*, 805 F.2d at 1474. Nor was this an innovation: Courts have considered predicate offenses categorically for at least a century. See *United States ex rel. Guarino* v. *Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.).

These cases refute the government's claim that *Taylor* "effectively forestalled" the development of a fact-specific approach under § 924(c). Br. 37. *Taylor* was decided in 1990. By then, the courts of appeals had already applied the categorical approach under every statute in which the residual clause's language appeared, for reasons having little to do with the practical and constitutional concerns the government emphasizes here. Post-*Taylor* cases simply continued the trend. See *Simms*, 914 F.3d at 249 & n.13. Courts "continued to treat precedents under Section 924(c)(3) and Section 16 as interchangeable" (Br. 39) because they *are* interchangeable.

Nor were these cases influenced by interpretations of § 16(b) in the prior-conviction context. Congress did not create the Immigration and Nationality Act's definition of "aggravated felony" until 1988, and did not include the cross-reference to § 16 (at issue in *Dimaya*) until 1990. See Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(2)–(3), 104 Stat. 4978, 5048. Thus, when Congress "separated" § 924(c) and § 16 in 1986 and for four years thereafter, both statutes applied mainly to present offenses. See *supra* p. 26. And the identical Bail Reform Act provisions have always applied contemporaneously. See § 3142(f)(1)(A). The circuits settled on the categorical approach to § 924(c) because that is what its language requires, not because they were overawed by *Taylor*.

This Court, too, "has always rooted the categorical approach in the statutory language chosen by Congress and consistently defended this approach as a means of effectuating congressional intent." *Simms*, 914 F.3d at 240. *Taylor*, *Leocal*, *James*, and *Dimaya* all emphasized the statutory text, explaining that the "only plausible" reading of such language is to require a categorical analysis. *Taylor*, 495 U.S. at 602; see

also *Dimaya*, 138 S. Ct. at 1217 (plurality) ("§ 16(b)'s text creates no draw: Best read, it demands a categorical approach."); *James*, 550 U.S. at 207–08 (the ACCA's "residual provision speaks in terms" that require an "ordinary case" inquiry); *Leocal*, 543 U.S. at 7 ("This language requires us to look to the elements and the nature of the offense of conviction[.]"). That is, the Court's "decisions have consistently understood *language* in the residual clauses of both ACCA and § 16 to refer to 'the statute of conviction, not to the facts of each defendant's conduct.'" *Dimaya*, 138 S. Ct. at 1217 (plurality) (emphasis added).

True, *Dimaya* noted practical and constitutional issues that would arise from a fact-specific approach to past offenses under § 16(b). *Id.* at 1216–17. But *Leocal* did not. 543 U.S. at 7. It instead adopted the categorical approach, for both past offenses and present ones, based on § 16(b)'s language. See *id.* at 7 & n.4, 11 n.8 (noting § 16's present-offense applications and the statute's lack of ambiguity); *e.g.*, § 842(p) (distribution of information relating to explosives in furtherance of a crime of violence); § 1959 (threats to commit crimes of violence in aid of racketeering activity).

The practical and constitutional concerns the government stresses are thus additional reasons—on top of the statutory text, structure, and history—to *reject a fact-specific approach to prior convictions*. They are not why the categorical approach was adopted in the first place.

3. The government's ultimate claim—that the categorical approach just isn't needed under § 924(c)—fails as well. It is not for the government or the courts to rewrite Congress's enactments to suit their policy preferences. *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). But even setting

that principle aside, the government is mistaken. The categorical approach serves the important purpose "of limiting the statute's penalties to specific classes of federal crimes where the use of a firearm is especially dangerous." *Simms*, 914 F.3d at 247.

As explained above, § 924(c) originally criminalized the use of a firearm in conjunction with any federal felony. But in 1984, Congress "narrow[ed]" the statute's scope (while greatly increasing its penalties) to reach only "crime[s] of violence" rather than "any felony." S. Rep. No. 97-307, at 888; *supra* p. 25. The government's fact-based approach would undo Congress's decision by again allowing "any felony" to serve as a § 924(c) predicate—regardless of the "nature" of the offense—so long as the jury could find the requisite risk based on "the specifics of" the case. Br. 20. Those specifics will necessarily include the presence of a gun, which will greatly increase the odds of an affirmative risk finding. Likewise, the government's reading would render Congress's 1986 addition of "drug trafficking crime[s]" largely redundant, since any drug offense could be a "crime of violence" based on its specific facts.

This is yet another reason courts adopted the categorical approach after 1984: A fact-specific approach "would make any felony a 'crime of violence' simply because a firearm was present." *Meyer*, 803 F.2d at 249. "Had Congress so intended, it could easily have applied § 924(c) to all felonies [again]." *Id.* Since it did not, courts should not "judicially repeal the 1984 and 1986 congressional amendments to § 924(c)." *Simms*, 914 F.3d at 247.

To avoid this problem, the government has elsewhere suggested that jurors could be "instructed not to find a crime of violence based *solely* on the presence of a firearm." *Id.* at 247–48. But it has not of-

fered that proposal here, and not one of its example jury instructions contains any such directive. Regardless, this is not a solution. The presence of a gun in combination with *any* other facts could still establish a crime of violence under this proposal.

Moreover, the modern statute's nexus requirement is much broader than the original. Until 1984, the statute punished using a gun to commit, or unlawfully carrying a gun during, a federal felony. Pub. L. No. 90-618, § 102, 82 Stat. at 1223–24. Now, it punishes using or carrying a gun "during and in relation" to a predicate offense *or* possessing a gun "in furtherance of" that offense. § 924(c)(1)(A). The upshot is that even lawful gun possession could (under the government's view) trigger liability under § 924(c), so long as the prosecutor could identify some nexus between the possession and a felony, even a typically nonviolent one. That is a fundamentally different regime from the one Congress created in 1984. And it is not "more workable" (Br. 42) than the categorical approach.

4. Other statutes provide still more evidence that the categorical approach applies equally in the present-offense context. The Bail Reform Act's "crime of violence" inquiry is necessarily categorical, since the statute requires a threshold "crime of violence" determination before the court has even held a hearing. See § 3142(f)(1)(A); *Singleton*, 182 F.3d at 11. So too the statute requiring the Bureau of Prisons to provide written notice of the release of certain prisoners, including those "convicted of ... a crime of violence (as defined in section 924(c)(3))." § 4042(b)(3). This provision does not merely use § 924(c)'s language, but actually cross-references it. And this must be a categorical inquiry; prison officers cannot feasibly reconstruct the facts of every defendant's crime to deter-

mine whether the notification obligation attaches. Finally, "Congress, through § 16, has also applied the categorical approach to many other statutes that similarly involve contemporaneous prosecutions." *Simms*, 914 F.3d at 246; *e.g.*, § 25(b) (intentionally using a minor to commit a crime of violence); § 119(a) (releasing confidential information to threaten or incite a crime of violence). All of this shows that when Congress uses this language—in any context—it requires a categorical approach. If the approach needs to be changed, that change must come from Congress.

II. CONSTITUTIONAL AVOIDANCE CANNOT JUSTIFY A FACT-SPECIFIC APPROACH.

"The canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.'" *Jennings*, 138 S. Ct. at 842. "In the absence of more than one plausible construction, the canon simply has no application." *Id.*; see *Clark*, 543 U.S. at 385.

For all the reasons above, the government's reading of § 924(c)'s residual clause is not plausible or fairly possible. Precedent confirms the point. *Leocal* noted unanimously that this same language contains no ambiguity. 543 U.S. at 7, 11 n.8. And *Dimaya* reiterated that it "has no 'plausible' fact-based reading." *Dimaya*, 138 S. Ct. at 1218 (plurality); see *id.* at 1232 (Gorsuch, J., concurring in part and concurring in the judgment) ("[O]ur precedent seemingly requires this [categorical] approach ...."). If avoidance could not save § 16(b), it cannot save § 924(c)'s residual clause either.

The government nevertheless argues that avoidance requires a fact-specific approach "even if [that] approach [is] not the best reading of the statutory

text." Br. 45. According to the government, that novel construction is necessary to avoid a vagueness holding, which (in its telling) would lead to drastic consequences. *Id.* at 48–53. But avoidance does not allow the Court to rewrite a criminal statute. The consequences of a vagueness holding will be limited, but the government's approach would greatly expand its ability to use the statute's severe mandatory penalties at the expense of fairness, predictability, and congressional intent.

A. Striking down the § 924(c) residual clause will not impair the government's ability to secure lengthy sentences for violent offenders.

This Court has rejected the avoidance gambit twice before. *Dimaya*, 138 S. Ct. at 1217–18 (plurality); *id.* at 1232 (Gorsuch, J., concurring in part and concurring in the judgment); *Johnson*, 135 S. Ct. at 2561–62. To justify a different outcome here, the government warns of "severe practical consequences" if § 924(c)'s residual clause is invalidated: "some of the most violent criminals on the federal docket" will escape punishment or be "immediately released from prison." Br. 49, 52. These dire warnings are overblown.

Invalidating the residual clause will almost never save a defendant from severe punishment. Indeed, striking down the clause will not even save many defendants from liability *under § 924(c)*. The government gravely observes that "more than 3,000 defendants were charged with a §924(c) violation" in the last year—but that figure includes defendants who were never convicted of that offense, as well as defendants convicted of possessing guns in furtherance of drug-trafficking crimes. Of the 1,976 defendants convicted under § 924(c) in fiscal year 2016, for example,

around half committed drug crimes. See U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 21, 23 (Mar. 2018). Those charges, convictions, and sentences will not be affected by this case at all.

Most of the remaining defendants are covered by § 924(c)'s *elements* clause, which captures typically violent crimes like robbery or carjacking. See, *e.g.*, *United States* v. *Kundo*, 743 F. App'x 201, 203 (10th Cir. 2018) (collecting carjacking cases); *United States* v. *Gooch*, 850 F.3d 285, 292 (6th Cir. 2017) (Hobbs Act robbery); *United States* v. *Armour*, 840 F.3d 904, 909 (2d Cir. 2016) (bank robbery). Elements-clause offenders, like drug offenders, will still be culpable under § 924(c) without the residual clause. And even where the government charges the use or possession of a firearm in connection with a conspiracy, the case—as here—often also involves a completed substantive offense that would satisfy the elements clause. See *Simms*, 914 F.3d at 232–33. In such cases, the residual clause merely provides an alternative basis for the first § 924(c) conviction, or opens the door to an additional conviction that increases the already severe minimum punishment and further reduces a district court's sentencing discretion.

A holding for Respondents will not have a significant effect even in those cases where only the residual clause applies. A § 924(c) defendant is, by definition, "subject to punishment for" the predicate offense. *Rodriguez-Moreno*, 526 U.S. at 280; Br. 19. And the sentence for that predicate offense must account for both the "nature" *and* the "circumstances" of the crime, see § 3553(a)(1), "which will necessarily include whether the offender used a firearm," *Simms*, 914 F.3d at 253.

Thus, in many cases cited by the government, the district court could impose the same aggregate punishment even without § 924(c). In *Simms*, for example, the defendant pleaded guilty to conspiracy to commit Hobbs Act robbery and was convicted under § 924(c) of brandishing a firearm in connection with that conspiracy. 914 F.3d at 232–33. The court selected an aggregate sentence for both counts of just over 16.5 years. *Id.* at 252. By itself, the conspiracy count carries a 20-year maximum penalty. § 1951(a). The government's other cases are similar. See Opening Brief of Appellants 4, *United States* v. *Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (No. 15-3020), 2016 WL 6563427, at *4 (aggregate sentence of 224 months for conspiracy and § 924(c)); *United States* v. *Salas*, 889 F.3d 681, 683 (10th Cir. 2018) (additional convictions under §§ 842(i), 844(n), and 844(i) would authorize the same 35-year total sentence), *petition for cert. filed*, No. 18-428 (Oct. 3, 2018); *United States* v. *Jenkins*, 849 F.3d 390, 393–94 (7th Cir. 2017) (court imposed a 25-year, 8-month term of imprisonment; kidnapping, § 1201(a), allows a life sentence), *vacated on other grounds*, 138 S. Ct. 1980 (2018).

Indeed, "where § 924(c) convictions are invalidated"—whether on direct or collateral review—"the government routinely argues that an appellate court should vacate the entire sentence so that the district court may increase the sentences for any remaining counts up to the limit set by the original aggregate sentence. And appellate courts routinely agree." *Dean* v. *United States*, 137 S. Ct. 1170, 1176 (2017) (citation omitted). Where the government does not secure a conviction under § 924(c), the advisory Sentencing Guidelines typically recommend a longer sentence on the predicate crime. See U.S. Sentencing Guidelines Manual § 2K2.4 cmt. 4. (2018). And of course courts

can upwardly vary from the guidelines if appropriate. In this very case, the government agrees that the district court should conduct a complete resentencing if Count Two remains vacated. Response of the United States to Appellants' Petitions for Panel Rehearing at 10. And Respondents' other convictions would allow the same aggregate sentence even without their residual-clause conviction. *Id.*

The true "practical consequence" of striking the § 924(c) residual clause, therefore, will almost never be that a violent offender goes free who would otherwise go to prison. At most, the government will lose its ability—in a small number of cases—to force a sentencing court to impose a longer sentence than the court would otherwise impose under its discretionary sentencing authority. See § 3553(a). Drug-trafficking and elements-clause convictions will be wholly unaffected. In any event, courts do not decide whether to apply or withhold the Constitution's guarantees based on such consequences. *District of Columbia* v. *Heller*, 554 U.S. 570, 636 (2008). And Congress "remains free ... to write a new residual clause that affords the fair notice lacking here." *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring).

B. The government's alternative reading expands its power under § 924(c) in unexpected and unjustified ways.

While a vagueness holding will only rarely take § 924(c) off the table, the government's new fact-based approach would expand the crime beyond any predictable boundary. See *supra* pp. 34–35. The government's harmlessness argument illustrates just how broadly it would cast § 924(c)'s net: In the government's view, it was not Respondents' agreement to commit robbery that made the conspiracy violent; it was all the conduct that followed that agreement,

even the attempt to escape while it was raining. Br. 6, 54 (describing and relying on evidence of a car chase under "'[e]xtremely dangerous and wet' conditions"). There is no principled limit to the re-imagined crime.

Prosecutors could convince a jury that *any* felony, even a typically non-violent one, was a "crime of violence" because of "the specific way in which [that] crime was committed." Br. 20. For example, an alien who illegally re-entered the country while carrying a gun to protect himself or his family from cartel violence might, in a prosecutor's view, have committed a "crime of violence." Cf. 8 U.S.C. § 1326(a). The same would be true if he traded that gun, even unloaded, to a smuggler in exchange for passage. Cf. *Smith* v. *United States*, 508 U.S. 223, 238–39 (1993) (exchanging a gun for drugs is a "use" of the gun "during and in relation to" the drug crime). The new risk "element" would be limited only by a prosecutor's imagination and persuasive ability. Unlike any previous incarnation, the crime could now reach a legal gun owner who counterfeits money, § 471, pays or receives a bribe, § 201, shares classified data with the press, see § 798, uses someone else's identity, § 1028, sells bootleg DVDs or fake designer bags, see §§ 2318, 2320, or anything else. The government need only argue that some underlying or extraneous facts made the crime risky, and that the gun helped advance the offense in some way.

This surprising expansion of § 924(c) would make the crime far broader and even less predictable than it is under the current categorical regime. The categorical approach, while fundamentally flawed, at least provides some limits on § 924(c). A defendant who conspired to illegally hunt wildlife and sell the meat in violation of the Lacey Act, 16 U.S.C.

§ 3373(d), can rest easy in the assurance that his hunting rifle will not trigger liability under § 924(c). That assurance would disappear under the fact-based approach.

This unprincipled expansion would run headlong into the fair-notice and arbitrary-enforcement problems a fact-based approach supposedly avoids. See *Kolender* v. *Lawson*, 461 U.S. 352, 357–58 (1983). The threat of § 924(c)'s severe mandatory penalties—particularly the risk of multiple, consecutive sentences—gives prosecutors extraordinary leverage in plea negotiations. Under the government's approach, prosecutors would retain that leverage for all of the crimes currently covered by the categorical residual clause, since those offenses ordinarily involve a risk of force. The new approach would also reach some marginal offenses—like possession of a short-barrel shotgun—that might or might not qualify under the categorical approach. Compare *Dimaya*, 138 S. Ct. at 1237–38 (Roberts, C.J., dissenting) (explaining why the ordinary case of possessing a short-barreled shotgun might not satisfy § 16(b)), with *United States* v. *Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995) (reaching opposite conclusion under § 924(c)(3)(B)). But, as a bonus, the government would *extend* § 924(c) and its powerful leverage to every felony prosecution where a gun was found, used, or possessed, even those that are obviously nonviolent under the categorical approach.

Further, because identifying a "crime of violence" would shift from a legal determination to a factual one, defendants would lose the ability to challenge unusual or outlandish invocations of § 924(c) by pretrial motion. Fed. R. Crim. P. 12(b)(1). The only way to know whether a felony is a "crime of violence" would be to try the case before a jury. For all these

reasons, ordinary citizens would be unable to predict which cases would result in § 924(c) liability, and prosecutorial discretion would be virtually limitless.

C. Avoidance is inappropriate because the rule of lenity independently bars the government's construction.

The rule of lenity independently bars a fact-based approach precisely because it would dramatically expand § 924(c)'s reach while making its application in many cases even more uncertain. See *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); accord *Yates*, 135 S. Ct. at 1088. And where lenity applies, avoidance cannot.

Both lenity and avoidance are tools for addressing ambiguity, and—properly applied—both safeguard the separation of powers. Avoidance does so by presuming that Congress takes the Constitution seriously, *INS* v. *St. Cyr*, 533 U.S. 289, 300 n.12 (2001), and lenity by ensuring that "legislatures and not courts ... define criminal activity," *United States* v. *Bass*, 404 U.S. 336, 348 (1971).

But lenity goes further, serving critical constitutional values where avoidance is agnostic. It safeguards due process by ensuring that laws provide "fair warning" as applied, *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931), and "embodies" a civilized society's "instinctive distaste[] against men languishing in prison unless the lawmaker has clearly said they should," *Bass*, 404 U.S. at 348 (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* Benchmarks 196, 209 (1967)). Thus, "applying constitutional avoidance to *widen* a statute's reach fails to keep faith with the rule of lenity because it resolves a statutory ambiguity in a manner

contrary to the interests of criminal defendants." *Simms*, 914 F.3d at 257–58 (Wynn, J., concurring); see *id.* at 250–51 (majority); cf. *Cruz*, 805 F.2d at 1474–75 (applying lenity to confirm that drug trafficking was not a § 924(c) "crime of violence").

Indeed, there is some irony in the government's plea to avoid invalidating a criminal law on vagueness grounds by adopting a vastly broader—and in some ways even less predictable—interpretation. Vagueness and lenity are "related manifestations" of the Constitution's fair-warning requirement. *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). The government's proposal would disserve both of these principles at once by reaching many more offenses while reducing the amount of notice provided and increasing the risk of arbitrary enforcement.

Because lenity—like avoidance—requires ambiguity, the Court need not resort to either doctrine here. But as *Leocal* observed of § 16(b)'s identical language, "[e]ven if [the statute] lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute" against the government. 543 U.S. at 11 n.8. Indeed, this would be "a textbook case" for lenity. *Hayes*, 555 U.S. at 436 (Roberts, C.J., dissenting). As the Chief Justice explained, where a statute has either a categorical reading that would apply narrowly, or a fact-based reading that would apply far more broadly, lenity demands the narrower construction unless the "text 'clearly warrants'" the broader one. See *id.* (quoting *Crandon* v. *United States*, 494 U.S. 152, 160 (1990)). There is no serious argument that § 924(c)'s text "clearly warrants" a fact-based approach. Lenity likewise prohibits the government's attempt to construe two identical statutory provisions differently, "lest those subject to the criminal law be misled." *Santos*, 553 U.S. at 523 (plurality).

It is no answer to say that the government's approach is more lenient because it would (hypothetically) give a defendant charged with a categorically violent conspiracy a fact-based escape hatch at trial. Because the Court's lenity-based construction of a statute governs "in future cases," *United States* v. *Thompson/Ctr. Arms Co.*, 504 U.S. 505, 519 (1992) (Scalia, J., concurring); see *United States* v. *Kozminski*, 487 U.S. 931, 951–52 (1988), lenity requires the interpretation that would "generally be more ... lenient" for—and ensure fair notice to—defendants as a class, cf. *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). Thus, lenity does not favor a narrower construction of a criminal law in a few cases over a far broader construction in the vast majority. See *United States* v. *Sherbondy*, 865 F.2d 996, 1009 n.17 (9th Cir. 1988) (applying lenity to construe the ACCA's residual clause categorically, even though that would "yield a harsher result for a narrow group of potential defendants" who could prove that their specific acts "did not entail the risk of violence," because a narrower categorical reading would further lenity's goals for "the substantial majority of defendants"); cf. Note, *The New Rule of Lenity*, 119 Harv. L. Rev. 2420, 2441 n.112 (2006) ("The Court applies lenity to a statute that criminalizes some innocent conduct even if the specific defendant involved knew that her action was wrongful.").

Lenity therefore bars the government's fact-based approach—whether or not avoidance would otherwise allow it. "[Thirty-five] years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the [government]," *Hayes*, 555 U.S. at 437 (Roberts, C.J., dissenting), even if the alternative requires invalidation.

D. Adopting the fact-based approach would offend the separation of powers.

Finally, invoking avoidance here would be inappropriate because it would (1) directly contradict all evidence of Congress's intent and (2) cause an unprecedented judicial expansion of a criminal statute. Applying avoidance in this way would offend the separation of powers.

No amount of textual gymnastics can support the government's position. As Congress wrote it, the residual clause defines a "crime of violence" as:

> [A]n *offense that is a felony* and ... that *by its nature*, involves a substantial risk that physical force against the person or property of another *may be used* in the course of committing the offense.

§ 924(c)(3)(B) (emphasis added). To support the government's interpretation, the statute would have read something like this:

> [A]n offense that is a felony and ... that, *based on the facts underlying the offense, involved* a substantial risk that physical force against the person or property of another *may have been used*.

Congress could have adopted the latter formulation. Indeed, it may yet do so—this language comes from the amendment pending in the House Judiciary Committee. H.R. 7113, 115th Cong. (2d. Sess. 2018). But it is "for Congress, not this Court, to rewrite" the statute along these lines. *Blount*, 400 U.S. at 419. "'[R]ewrit[ing] a law to conform it to constitutional requirements' ... would constitute a 'serious invasion of the legislative domain,' and would "sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place.'" *United States* v. *Stevens*, 559 U.S. 460, 481 (2010) (omission in original).

Indeed, avoidance is "a means of giving effect to congressional intent, not of subverting it." *Clark*, 543 U.S. at 382. But using avoidance here would turn a canon "followed out of respect for Congress" into a license to disregard Congress's directives. See *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991). Even setting the plain text aside, Congress embraced the categorical approach when it copied § 16's text into § 924(c), knowing it had been read categorically, and then left it unchanged for three decades while the courts uniformly applied it that way. The government identifies no case where the Court has used avoidance to upset a firmly established, congressionally ratified reading of the statutory text.

Nor can avoidance be justified here by the usual presumption that Congress does not "intend to infringe constitutionally protected liberties." *St. Cyr*, 533 U.S. at 300 n.12. The Court has already held in *Leocal* and *Dimaya* that the 98th Congress intended an unconstitutional reading when it enacted § 16(b), and it would make little sense to presume that the 99th meant anything different when it copied the very same text into § 924(c).

Finally, "applying the doctrine of constitutional avoidance to *expand* the reach of a criminal statute conflict[s] with Congress's exclusive authority to define crimes and punishments." *Simms*, 914 F.3d at 257 (Wynn, J., concurring). The government's proposed reading of § 924(c)'s residual clause would extend the statute to reach any defendants whose specific conduct poses a substantial risk of force. *Supra* pp. 34–35, 40–43. That would be an "unprecedented application" of avoidance. *Id.* at 254. "[C]ases 'paring down' federal statutes to avoid constitutional shoals are legion." *Skilling* v. *United States*, 561 U.S. 358, 406 n.40, 409 n.43 (2010). But no decision has ever

expanded a criminal statute on that basis. *Simms*, 914 F.3d at 256 (Wynn, J., concurring).

There are good reasons for this lack of precedent. It is a bedrock principle that "the legislature, not the Court ... define[s] a crime, and ordain[s] its punishment." *Dowling* v. *United States*, 473 U.S. 207, 214 (1985). "[N]arrowly constru[ing] a broadly worded" statute to avoid constitutional concerns respects that principle, *Lanier*, 520 U.S. at 267 n.6; *Skilling*, 561 U.S. at 409 n.43, because "the conduct proscribed by the limiting construction necessarily falls within the scope of the conduct Congress intended to proscribe," *Simms*, 914 F.3d at 256–57 (Wynn, J., concurring). But the opposite would be true here: Applying avoidance to adopt a "more expansive" interpretation would "entail[] *the judiciary* holding unlawful conduct for which there necessarily is some doubt as to whether Congress intended to make [it] a crime." *Id.* at 257. The Court should reject that unprecedented and unprincipled extension of the avoidance doctrine.

III. EVEN IF THE COURT ADOPTS A NEW CONSTRUCTION OF THE STATUTE, RESPONDENTS' CONVICTIONS CANNOT BE REINSTATED.

The government urges the Court to reinstate Respondents' residual-clause convictions because the district court's failure to submit the substantial-risk "element" to the jury was harmless. Br. 53. Alternatively, it seeks to force Respondents to defend a second trial under the government's new theory. But the government brought about the "errors" of which it now complains. And the incorrect jury instruction is only the tip of the iceberg: even under the government's construction, Respondents suffered multiple overlapping constitutional violations that cannot be found harmless.

A. If the residual clause's "substantial risk" requirement is a conduct-based element, Respondents suffered multiple harmful constitutional violations.

Under the government's new interpretation, the jury must be convinced beyond a reasonable doubt that the predicate offense involved the requisite risk of force. Br. 53. Respondents' jury did not make that finding. *Id.* But the government insists that "the only error in this case was a misinstruction of the jury." U.S. Cert-Stage Reply 6. Not so. If the government's reading is correct, there were additional constitutional violations that resist harmless error analysis.

First, the indictment does not allege that *this* conspiracy "by its nature" involved a "substantial risk" that force would be used. ROA 1152. It merely asserts that the conspiracy was a crime of violence. If substantial risk is a fact-based element, then the grand jury must find and charge it. *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 107 (2007). And even if the indictment's total omission of an element may constitute harmless error, but see *id.* at 116–17 (Scalia, J., dissenting), it cannot do so here. Respondents had "no incentive" or opportunity "to contest" whether the conspiracy itself presented a risk of force, since those facts did "not matter under the law" as everyone understood it. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2253 (2016). Because Respondents had no notice of or opportunity to address the new "element" at trial, the record does not permit a reviewing court to determine harmlessness.

Second, reinstating or retrying the residual-clause convictions under the new theory would constructively amend the indictment. "[A]fter an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself."

Stirone v. *United States*, 361 U.S. 212, 215–16 (1960). The government's reinterpretation of the statute would require prosecution of a different crime than the one charged by the grand jury. That is a structural error. *Id.* at 217.

Third, the government cannot deny that the § 924(c) residual clause was unconstitutionally vague *as applied* below. All parties and the trial judge proceeded on the understanding that the ordinary-case approach controlled, and the "crime of violence" finding was based upon application of an uncertain risk standard to the judicially imagined ordinary case of conspiracy. Now all parties agree that approach is unconstitutional. Even if this Court were to adopt some kind of saving construction for the statute, that would not save Respondents' residual-clause convictions. *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966) ("[W]here an accused is tried and convicted under" an unconstitutional interpretation of a statute, "the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act.").

Finally, if the risk posed by this specific conspiracy was an element of § 924(c), the jury charge did not merely *omit* an element; the district court directed a verdict on that element. The court told the jury that the Hobbs Act conspiracy constituted a "crime of violence" as a matter of law. That, too, is structural error. See *Rose* v. *Clark*, 478 U.S. 570, 578 (1986); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572–73 (1977); *United Bhd. of Carpenters & Joiners* v. *United States*, 330 U.S. 395, 408–09 (1947).

This case is unlike *Neder* v. *United States*, which held that the omission of an element from a jury charge may be harmless. 527 U.S. 1, 15 (1999). The *Neder* district court merely told the jury that it need

not consider an element. It did not tell the jury to *find* the element, as happened here. And in *Neder*, the defendant understood that he could contest materiality—just to the judge rather than the jury. *Id.* at 14. Here, by contrast, the issue is not just *who* decides, but *what* is to be decided. Respondents had no way of knowing they could contest the riskiness of the conspiracy to anyone.

Finally, even if harmless-error analysis applies, the government's speculation about what the jury might have decided on a different record is unreliable. Most of the evidence the government discusses relates to the commission of the robberies, not the conspiracy. Br. 53–55. And the jury did not share the government's view of events, as shown by Mr. Davis's acquittal on Count Three. ROA 1369. The government thus cannot show that these errors were harmless beyond a reasonable doubt.

B. Respondents would prevail under an always-a-risk approach.

In *Dimaya*, Justice Gorsuch proposed an "alternative reading" under which courts would ask "whether the defendant's crime of conviction *always*" involves "a substantial risk of physical force." *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring in part and concurring in judgment). The government has not taken up Justice Gorsuch's invitation, presumably because Respondents would prevail under that approach too. A Hobbs Act conspiracy does not *always* present a substantial risk of force. Cf. Br. 50. The crime is complete upon the formation of an agreement. If an overt act must be proved, it need not be violent. Br. 50 n.5; *e.g.*, *United States* v. *Smith*, 215 F. Supp. 3d 1026, 1034 n.54 (D. Nev. 2016) ("[A] defendant could be convicted based on an agreement to commit the robbery and purchasing a ski mask to conceal his identi-

ty during the planned robbery."). Thus, this offense does not "always" or "automatically" involve a risk of force. Cf. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring in part and concurring in judgment).

C. The government's belated change in position precludes a remedy in its favor.

The government urges the Court to adopt a fact-based reading of the § 924(c) residual clause, rather than driving "straight into the teeth of *Johnson* and *Dimaya*." Br. 47. But that collision has already happened, with the government at the wheel. At every step below, the government asked the courts to apply the ordinary-case categorical approach. The district court complied. Respondents built the trial record on that understanding. The government successfully resisted dismissal, obtained convictions, and defended those convictions by invoking the *Leocal* approach. That means the government cannot restore the conviction through "judicial acceptance of an inconsistent position in a later proceeding." *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001).

When Mr. Glover tried to invoke the fact-specific approach earlier in the case, the government again resisted by arguing he invited (and forfeited) any error by joining in the agreed proposed instructions. U.S. 5th Cir. Br. 26–29. However this court interprets § 924(c), the government should not get any relief until it explains why it should be treated any more favorably. See Fed. R. Crim. P. 30(d) ("Failure to object" to jury instructions "in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)."); *Dimaya*, 138 S. Ct. at 1232 (Gorsuch, J., concurring in part and concurring in judgment) ("[N]ormally courts do not rescue parties from their concessions, maybe least of all concessions from a

party as able to protect its interests as the federal government.").

CONCLUSION

Because the Fifth Circuit correctly held the § 924(c) residual clause invalid, the Court should affirm. Alternatively, the Court should affirm because, however the statute is construed, Respondents' convictions cannot stand. At the very least, if the Court adopts the government's reading of the statute, it should vacate the judgment below and remand with instructions for the Fifth Circuit to address Respondents' case-specific arguments about the validity of their convictions.

Respectfully submitted,

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March 14, 2019

ADDENDUM

ADDENDUM A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S4 16-CR-408(CS)

UNITED STATES OF AMERICA

v.

VIRGINIA BLANCO,

Defendant.

U.S. Courthouse
White Plains, N.Y.
July 16, 2018
9:00 a.m.

Jury Trial Before: HON. CATHY SEIBEL,
United States District Judge

APPEARANCES

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Official Court Reporter

* * *

[605] place where the firearm was located and had the power and intention to exercise control over the firearm. Mere presence in a place where a firearm is located is not enough. A person need not have physical custody of an object to be in legal possession of it, so long as he or she has the ability to exercise substantial control over an object and the intent to exercise such control, and the firearm is immediately available to him or her. More than one person can have control over the same firearm. The law recognizes that possession may be sole or joint. Control over an object may be demonstrated by the existence of a relationship between one person having the power or ability to control the item, and another person who has the actual physical custody. The person having control "possesses" the firearm because he or she has a relationship with the person who has actual physical custody of the firearm and because he or she can direct the movement or transfer or disposition of the firearm. In addition, an individual may have possession of an item that is not found on his or her person, because the individual has a relationship to the location where the item is maintained. In this manner, for example, a business person may legally possess things that are scattered throughout a number of stores or offices or installations around the country.

The second element that the Government must prove beyond a reasonable doubt is that the Defendant used or [606] carried the firearm during and in relation to a crime of violence, or possessed a firearm

in furtherance of such a crime. An offense qualifies as a crime of violence if you find that the offense, as committed, involved a substantial risk that physical force may be used against the person or property of another. Before you convict on Count Three, you must find that Count One, Count Two, or both qualify as a crime of violence. The phrase "during and in relation to" should be given its ordinary meaning. "Possessed a firearm in furtherance of a crime" requires both that the Defendant had possession of the firearm – either physically or because it was within her dominion and control – and that such possession helped forward, advance, or promote the commission of the crime, or was an integral part of the crime. The mere possession of the firearm at the scene of the crime is not sufficient under this definition. The firearm must have played some essential part in furthering the crime for this element to be satisfied on the basis of the Defendant's possession of the firearm.

The final element the Government must prove beyond a reasonable doubt for Count Three is that the Defendant knew she was carrying or using a firearm during and in relation to the underlying crime, or that she was possessing a firearm in furtherance of the underlying crime, and that the Defendant acted unlawfully and knowingly in doing so. I have already [607] defined "unlawfully" and "knowingly." To satisfy this element, you must find that the Defendant had knowledge that what she was carrying or using or possessing was a firearm as that term is generally used. The Government must also prove that the Defendant knew what she was doing – that she knew that she was carrying or using a firearm during and in relation to the commission of a crime of violence or possessing a firearm in furtherance of those crimes. It is not necessary, however, for the Government to prove

that the Defendant knew she was violating any particular law.

As with Count Two, the bank robbery count, a defendant may be found guilty of this third count, charging violation of Section 924(c), under an aiding and abetting theory or under a Pinkerton theory, as described in my instructions (at pages 31–32). In addition, I must give you some specific instructions regarding aiding and abetting as it applies to this count only. To convict the Defendant of aiding and abetting the crime charged in Count Three, you must find that the Defendant facilitated either the use, carrying, or possession of the firearm or the commission of the charged violent crime. It is not necessary that the Defendant facilitate both the possession, use, or carrying of the firearm and the underlying crime of violence. To convict the Defendant of this offense on an aiding and abetting theory, you must also find that the Defendant had advance knowledge

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ADDENDUM B

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
915 Lafayette Boulevard
Bridgeport, Connecticut

No. 3:17-cr-00065(SRU)

UNITED STATES OF AMERICA,

Government,

v.

HAROLD COOK, *et al*,

Defendants.

August 20, 2018

JURY TRIAL EXCERPT

JURY CHARGE AND CLOSING ARGUMENTS

BEFORE:

THE HONORABLE STEFAN R. UNDERHILL,
U.S.D.J.

Sharon L. Masse, RMR, CRR
Official Court Reporter
915 Lafayette Boulevard
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* * *

[26] willful and intentional conduct of the defendant. In order to establish that the defendant's conduct resulted in the death of the victim, the government must prove beyond a reasonable doubt that, but for the defendant's actions, the victim would not have died.

Count Two.

Mr. Cook, Mr. Mickens, and Mr. Hunter are all charged in Count Two of the indictment with the firearm-related murder, and with the aiding and abetting in the firearm-related murder, of Mr. Teasley in the course of kidnapping him. The relevant statutes are Title 18, United States Code, Sections 924(c), 924(j)(1), and 1111(a).

Section 924(c) makes it an offense for a person to use or carry a firearm during and in relation to any crime of violence or to possess a firearm in furtherance of a crime of violence.

Section 924(j)(1) makes it an offense to cause the death of a person, including by murder, through the use of a firearm in the course of a violation of Section 924(c).

Section 1111(a) defines murder as the unlawful killing of a human being with malice.

For you to find a defendant guilty of this charged offense, you must be convinced that the government

[27] has proven each of the following elements beyond a reasonable doubt:

First, that the defendant committed a crime of violence. The charged crime of violence in Count Two is kidnapping.

Second, that during and in relation to the commission of kidnapping, the defendant knowingly used or carried a firearm or knowingly possessed it in furtherance of a crime of violence.

Third, that the use of the firearm caused the death of the victim; and

Fourth, that the defendant acted with malice in causing the victim's death.

The first element that the government must establish beyond a reasonable doubt is that the defendant committed a crime of violence. In Count Two the crime of violence is the alleged kidnapping of Mr. Teasley.

You must first determine whether the kidnapping, as alleged in Count One, occurred. In doing so, you should refer to my previous instructions with respect to the first four elements of kidnapping, that is, the taking of the victim, the holding of the victim, the use of an instrument of interstate commerce, and the knowing and willful conduct. If you find that the government satisfied its burden with respect to all four of those [28] elements, then you must next determine whether that kidnapping was a crime of violence, that is, whether it was committed in a way that involved a substantial risk that physical force against the person or property of the victim would be used.

"Physical force" means violent force, force capable of causing physical pain or injury to another person.

"Substantial risk" means that there is a strong probability that the event, in this case the application of physical force during the commission of the crime, will occur. The event, here the physical force, need not actually occur in order for there to be a substantial risk that it may occur.

If you find that the government has proven that the kidnapping as alleged in Count One occurred and that it was committed in a way that involved a substantial risk of physical force against the person or property of the victim, then the government has satisfied the first element here, that the defendant committed the predicate crime of violence.

The second element that the government must establish beyond a reasonable doubt for Count Two is that the defendant knowingly used or carried a firearm during and in relation to the commission of the crime of [29] violence, and/or knowingly possessed a firearm in furtherance of the crime of violence.

A "firearm" is defined as any weapon that will, or is designed to, or may be readily converted to expel a projectile by the action of an explosive.

To satisfy this element, the government must prove that the defendant used, carried or possessed a firearm knowingly. This means that he acted purposefully and voluntarily, and not by accident or mistake. It also means that he knew that the weapon was a firearm, as we commonly use the word. However, the government is not required to prove that the defendant knew that he was breaking the law.

A. The government can satisfy this element by proving that the defendant used and/or carried a firearm during and in relation to the commission of a crime of violence.

In order to prove that the defendant used a firearm, the government must prove beyond a reasonable doubt an active employment of the firearm by the defendant during and in relation to the commission of a crime of violence. This does not mean that the defendant must actually fire or attempt to fire the weapon, although those acts would obviously constitute use of a weapon. Brandishing, displaying, or even referring to the weapon

* * *

ADDENDUM C

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 15-20652

UNITED STATES OF AMERICA

v.

D-3 EUGENE FISHER
D-4 COREY BAILEY
D-6 ROBERT BROWN II
D-13 ARLANDIS SHY
D-19 KEITHON PORTER

HON. GEORGE CARAM STEEH

JURY INSTRUCTIONS

* * *

[56] COURT'S INSTRUCTION NO. 26

COUNT THIRTY-TWO

POSSESSION OF A FIREARM IN
FURTHERANCE OF A CRIME OF VIOLENCE

(1) Count Thirty-Two of the indictment charges Eugene Fisher, Corey Bailey, Robert Brown II, Arlandis Shy, and Keithon Porter, with violating federal law by possessing a firearm in furtherance of a crime of violence, or aiding and abetting that offense. For you to find a defendant guilty of this crime, you must find

that the government has proved each and every one of the following elements beyond a reasonable doubt:

First: the defendant committed the RICO conspiracy charged in Count One;

Second: the defendant knowingly possessed a firearm;

Third: the possession of the firearm was in furtherance of the RICO conspiracy charged in Count One;

Fourth: at least one of the racketeering acts committed in furtherance of the enterprise involved a substantial risk that physical force may be used against the person or property of another.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "firearm" means any weapon which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive. The firearm need not be loaded.

[57] (B) The term "knowingly" means voluntarily and intentionally, and not because of mistake or accident.

(C) In order to prove "possession," the government does not necessarily have to prove that a defendant physically possessed the firearm. The law recognizes two kinds of possession—actual possession and constructive possession. Either one of these, if proved by the government, is sufficient.

(D) To establish actual possession, the government must prove that a defendant had direct, physical control over the firearm, and knew that he had control of it.

(E) To establish constructive possession, the government must prove that a defendant had the right

to exercise physical control over the firearm, and knew that he had this right, and that he intended to exercise physical control over the firearm at some time, either directly or through other persons.

(F) For example, if you left something with a friend intending to come back later and pick it up, or intending to send someone else to pick it up for you, you would have constructive possession of it while it was in the actual possession of your friend.

(G) Further, the government does not have to prove that a defendant was the only one who had possession of the firearm. Two or more people can together share actual or constructive possession over property. And if they do, both are considered to have possession as far as the law is concerned.

* * *

ADDENDUM D

[775] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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18 CR 16 (RJS)

UNITED STATES OF AMERICA

v.

AKAYED ULLAH,

Defendant.

New York, N.Y.
November 5, 2018
9:06 a.m.

Before: HON. RICHARD J. SULLIVAN
District Judge, and a Jury

Trial

APPEARANCES

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Also Present:

JOHN MAURER – Special Agent, FBI
MICHAEL DELUCA – Paralegal, U.S. Attorney
JASON T. FISCHER – Paralegal, Federal Defenders
CHIRAAYHU GOSRANI – Paralegal, Federal Defenders

* * *

[946] transportation vehicle when he boarded and rode subway with a destructive device, you must determine whether the subway was carrying at least one passenger or one employee at the time.

With respect to the second theory, that the defendant set off a destructive device with intent to cause death or serious bodily injury, you must determine whether the mass transportation vehicle or vehicles supported by the terminal structure, track, tunnel, station, or facility where the destructive device was set off was or were carrying at least one passenger or employee at the time of the offense.

That sounds a little tricky. You will have the instructions if you need to go through them again. There are two separate interrogatories if and only if you find the defendant guilty on Count Five.

Now Count Six. Count Six of the indictment charges the defendant with using and carrying a destructive device during and in relation to a crime of violence or possessing a destructive device in furtherance of a crime of violence in violation of section 924(c) of Title 18 of the United States Code. To satisfy its burden of

proof with respect to the crime charged in Count Six, the government must establish each of the following two elements beyond a reasonable doubt:

First, that the defendant committed a crime of violence for which he might be prosecuted in a court of the United States; and

[947] Second, that the defendant knowingly used or carried a destructive device during and in relation to the commission of or knowingly possessed a destructive device in furtherance of that crime of violence.

Let me go through these in more detail. The first element that the government must prove beyond a reasonable doubt as to Count Six is that the defendant committed a crime of violence for which he might be prosecuted in a court in the United States. I instruct you that Counts Three and five qualify as crimes of violence within the meaning of this count. So, if you find the defendant was guilty beyond a reasonable doubt of either or both of Counts Three and Five, then the government has met, or satisfied, the first element of this sixth count of the indictment.

Additionally, an offense qualifies as a crime of violence prosecutable in a court of United States if the offense by its nature involved a substantial risk that physical force might be used against the person or property of another. Physical force means force capable of causing physical pain or injury to a person or injury to property.

If you have found the defendant guilty of any of Counts One through Five, you must next determine whether that offense or offenses involved a substantial risk that physical force might be used against the person or property of another. You must consider each

count separately. So only for those [948] counts where you found the defendant guilty beyond a reasonable doubt are you going to do this.

If you previously found that the government proved beyond a reasonable doubt that the defendant is guilty of any of Counts One through Five, and then you find that any of those counts for which you found him guilty qualifies as a crime of violence, then the government has satisfied this first element of Count Six. But you must be unanimous as to which count or counts, if any, involved a substantial risk that physical force might be used against the person or property of another.

To ensure you are unanimous as to which count or counts, if any, involved a substantial risk that physical force might be used against the person or property of another, I am going to ask you to indicate on the verdict form which count or counts you concluded involved a substantial risk that physical force might be used against the person or property of another. That's the first element of Count Six.

The second element that the government must prove beyond a reasonable doubt for Count Six is that the defendant knowingly used or carried a destructive device during and in relation to one of the specified crimes of violence or that the defendant knowingly possessed a destructive device in furtherance of the commission of one of the specified crimes of violence.

If you recall, the specified crimes of violence

* * *

No. 18-431

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 18-431

UNITED STATES OF AMERICA, PETITIONER

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Legislatures typically define conduct as criminal based on what a defendant actually did, not what a judge imagines that a theoretical defendant might ordinarily do. Respondents nonetheless insist that this Court not only should, but *must*, construe 18 U.S.C. 924(c)(3)(B) as an extraordinary deviation from that practice. But while constitutional and practical concerns required the ordinary-case categorical approach in classifying prior convictions, that approach has no natural place in defining instant offense conduct. Nothing requires construing Section 924(c)(3)(B) to be a fish out of water—particularly when doing so would render it unconstitutionally vague.

Respondents' contrary position—which adopts the premise (*e.g.*, Br. 42) that application of a substantial-risk standard by a jury is *itself* unconstitutionally vague—is unsustainable. They invite further litigation over Section 924(c) prosecutions, other similarly-worded

federal statutes, and any efforts Congress might make to clarify that Section 924(c)(3)(B) requires a circumstance-specific approach. This Court should decline respondents' invitation to take a permanent red pen to critical parts of Title 18, and should instead respect Congress's efforts to criminalize conduct—like respondents' own—in which guns and crime form a dangerous mix.

A. The Definition Of A "Crime Of Violence" In 18 U.S.C. 924(c)(3)(B) Focuses On Actual, Not Imagined, Offense Conduct

Section 924(c)(3)(B) is best read to condition the criminality of a defendant's conduct on normal jury fact-finding, not judicial fictionalization. Everyone agrees that in a prosecution under Section 924(c), the jury must find (or the defendant must admit) that the defendant engaged in conduct that is a separate federal felony and that he employed a firearm in connection with that offense. See 18 U.S.C. 924(c)(1)(A); *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). As the government's opening brief explained (Br. 20-44), the jury naturally would, and readily could, simultaneously determine from the same evidence whether that underlying offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B).

1. The text of Section 924(c)(3)(B) is best read to require a circumstance-specific approach

Neither respondents nor their amici identify a single self-contained federal or state law that explicitly defines the actus reus of a crime based on the imagination of the judge, rather than the evidence before the jury. Nor do

they identify any sound reason, inherent in Section 924(c) itself, to construe it as an outlier in that regard.

a. A determination of whether the facts of a present offense create a "substantial risk" is exactly the type of circumstance-specific factfinding in which juries regularly engage. See Gov't Br. 23-25. In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), the government provided the Court with an appendix of "over two hundred state statutes that impose criminal liability for conduct that presents a 'risk,' 'substantial risk,' 'grave risk,' or 'unreasonable risk' of injury to others." Gov't Br. at 23, *Johnson*, *supra*, No. 13-7120 (*Johnson* Gov't Br.); see *id.* Appx. B. The Court concluded that "almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Johnson*, 135 S. Ct. at 2561. The Court's omnibus conclusion was presumably informed by the natural understanding that such terms, when they describe instant offense conduct, call for an inquiry into *that* conduct—not "an idealized ordinary case of the crime," *ibid.*

That is the best reading of Section 924(c)(3)(B)'s substantial-risk inquiry as well. Section 924(c)(3)(B) applies only "[f]or purposes of" Section 924(c) itself, and defines the "crime of violence" that a defendant "uses or carries" a firearm "during and in relation to" or "possesses" a firearm "in furtherance of." 18 U.S.C. 924(c)(1)(A) and (3). A defendant does not employ a firearm in connection with an abstract crime; he employs it in connection with *his* crime. Likewise, Section 924(c)'s requirement that a defendant's sentence be consecutive to "any term of imprisonment imposed for the crime of violence," 18 U.S.C. 924(c)(1)(D), necessarily refers to the sentence for his own particular crime

of violence, not an abstraction. Respondents' suggestion (Br. 18) that "crime of violence" instead refers to a "statute[]," because Section 924(c) at one point parenthetically references a "crime of violence * * * that provides for an enhanced punishment," 18 U.S.C. 924(c)(1)(A), is nonsensical. Even respondents do not believe that a "crime of violence" is *wholly* abstract—they would just define it based on judicially imagined facts rather than real ones.

b. The subsection-specific definition of "crime of violence" supports the commonsense inference that the relevant facts are jury findings, not the judge's brainchild. Section 924(c)(3) defines a "crime of violence" as an "offense that is a felony," 18 U.S.C. 924(c)(3), that either has a particular "element" that necessarily must exist in every case, 18 U.S.C. 924(c)(3)(A), or, alternatively, presents a "substantial risk" of violence in a particular case, 18 U.S.C. 924(c)(3)(B). Under each alternative, the jury is finding that the defendant's conduct was a "crime of violence"—either because it finds an element that always involves force (or a threat or attempt thereof) or because it finds that the conduct at issue involved a substantial risk of force.

Contrary to respondents' contention, that natural understanding of Section 924(c)(3) does not give "'two contradictory meanings'" to the terms "felony" and "offense," Br. 14 (citation omitted). This Court has recognized that words like "felony" and "offense" can simultaneously refer to *both* the facts of a particular case and the legal prohibition at issue. *Nijhawan* v. *Holder*, 557 U.S. 29, 34, 38-39 (2009); *United States* v. *Hayes*, 555 U.S. 415, 420-426 (2009); Gov't Br. 21-22. Indeed, the term "offence" in the Double Jeopardy Clause has

long been understood to encompass both the defendant's "'act or transaction'" and the "elements" of the relevant "'statutory provision[].'" *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977) (quoting *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)).

c. The conventional jury-focused understanding of the statutory language is reinforced by Section 924(c)(3)(B)'s reference to whether the requisite risk arises "in the course of committing the offense," 18 U.S.C. 924(c)(3)(B). In the context of a criminal prosecution, the "course of committing the offense" most plainly refers to the defendant's own offense conduct. See Gov't Br. 26-27. When a real-world course of conduct is already before the jury, it would be quite peculiar to require the judge to invent one. As respondents note (Br. 21), the Court in *Sessions* v. *Dimaya*, 138 S Ct. 1204 (2018), considered whether the course-of-commission phrase, if viewed as a temporal limitation on judicial invention, could (in combination with other factors) sufficiently cabin the inquiry so as to render such invention constitutionally sound. *Id.* at 1219. But no Justice in *Dimaya* suggested that the phrase *counseled in favor of* judicial imagination, rather than jury factfinding. See *id.* at 1216-1218 (plurality opinion) (omitting reference to that phrase in construing 18 U.S.C. 16(b)); see also *Leocal* v. *Aschroft*, 543 U.S. 1, 7 (2004) (focusing on other language in Section 16(b)).

Similarly, respondents do not dispute that Congress has often employed the word "involves" when it "require[s] looking into a defendant's underlying conduct rather than a hypothetical or idealized offense." *United States* v. *Douglas*, 907 F.3d 1, 12 (1st Cir. 2018); see Gov't Br. 27-30. Respondents' reliance (Br. 21) on the

"present-tense use" of that verb to support a "categorical inquiry" is misplaced. Like other federal criminal prohibitions, Section 924(c) refers to *all* offense conduct in the present tense, see, *e.g.*, 18 U.S.C. 924(c)(1)(A) ("uses," "carries," "possesses"). Respondents note (Br. 21, 46) that a pending bill would amend Section 924(c)(3)(B) to use the past tense. But even assuming that switching tenses would in itself clarify Congress's intent to submit offense conduct to the jury, this Court "routinely construe[s] statutes to have a particular meaning even as [it] acknowledge[s] that Congress could have expressed itself more clearly." *Torres* v. *Lynch*, 136 S. Ct. 1619, 1633 (2016).

d. Finally, the phrase "by its nature" can readily refer to conduct, rather than an abstraction. See Gov't Br. 30-31; see, *e.g.*, 34 U.S.C. 20911(7)(I) (referring to "conduct that by its nature is a sex offense against a minor"); *United States* v. *Price*, 777 F.3d 700, 708 (4th Cir.) (joining the Eleventh Circuit in interpreting that language to be circumstance-specific), cert. denied, 135 S. Ct. 2911 (2015); see also, *e.g.*, 18 U.S.C. 2281a(a)(1)(A) (referring to whether an "act" "by its nature" has the "purpose * * * to intimidate"); *H. J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 241 (1989) (referring to "past conduct that by its nature projects into the future"). Nobody disputes that "by its nature" refers to the normal or characteristic qualities of *something*. See Resp. Br. 15. And nothing suggests that the "something" must be the platonic ideal of a crime rather than the real crime before the jury. Although covered by the same (indivisible) statute, 18 U.S.C. 1201, kidnapping by pistol-whipping is "by its nature" different from kidnapping by trick, even if the second kidnapper has a gun in

his glove compartment because he is driving the victim through a dangerous neighborhood.

Respondents are thus incorrect (Br. 17) that the phrase "by its nature" would be "superfluous" if Section 924(c)(3)(B) referred to real-world conduct. To the contrary, it limits the inquiry to the offender's underlying conduct, while foreclosing consideration of extraneous facts, like his personal proclivity toward or against violence. See Gov't Br. 30-31. It also ensures that the mere use, carrying, or possession of a firearm, without more, is insufficient to turn an offense into a crime of violence. A defendant who merely prepares false tax returns, for example, is not committing a "crime of violence" simply because he has a violent temper or keeps a gun under his desk for protection. Instead, the defendant's employment of a firearm must "up[] the ante," *Rosemond* v. *United States*, 572 U.S. 65, 80 (2014), by adding to risk that would exist even if no weapon, or a different weapon, were employed.

Respondents disregard the important function that "by its nature" serves—ensuring that the defendant employed a firearm in connection with conduct that was *otherwise* dangerous—when they caricature (Br. 41) the circumstance-specific approach as potentially bringing "*any* felony" within Section 924(c)'s scope. Respondents' observation (Br. 17-18) that a handful of jury instructions have omitted the phrase "by its nature" suggests, at most, that it is not necessary in every case (*e.g.*, because no extraneous evidence would lead the jury astray). Jury instructions (which are for laypeople) do not invariably parrot every word of the statutory text, and salutary efforts to simplify the jury's deliberations do not suggest that the jury should not deliberate on the issue at all.

2. No precedential or historical considerations favor an ordinary-case categorical approach to Section 924(c)(3)(B)

Because the text and jury-trial context of Section 924(c) would not in themselves signal a sharp departure from standard methods of proof, respondents' argument relies heavily on path dependency—*i.e.*, that because the ordinary-case categorical approach has applied to *other* statutes, it should apply to Section 924(c)(3)(B) as well. In making that argument, respondents invite this Court into the same trap that many lower courts—and the government itself—fell into for many years. Before *Johnson* and *Dimaya* held that the ordinary-case categorical approach is unconstitutional, it was understandable, and not unreasonable, to superimpose that approach on Section 924(c)(3)(B), notwithstanding its uncomfortable fit in the jury-trial context. But that course ceases to make sense once it is evident that it leads over a cliff. On due consideration, it is clear that the reasons for adopting an ordinary-case categorical approach in other contexts do not apply to Section 924(c)(3)(B), and nothing suggests that Congress either anticipated or mandated an interpretation that would render the provision unconstitutionally vague.

a. The practical and constitutional concerns that animated the adoption of the categorical approach to *classifying prior convictions* have no relevance to Section 924(c)(3)(B), which *describes the instant offense*. See Gov't Br. 40-44. In the prior-conviction context, the ordinary-case categorical approach obviates the difficulties of relitigating prosecutions from long ago, *Moncrieffe* v. *Holder*, 569 U.S. 184, 200-201 (2013), and "avoid[s] the Sixth Amendment concerns that

would arise from sentencing courts' making [the] findings of fact" necessary to do so, *Dimaya*, 138 S. Ct. at 1217 (quoting *Descamps* v. *United States*, 570 U.S. 254, 267 (2013)).

Respondents do not dispute that those concerns are entirely absent in the context of Section 924(c)(3)(B). Nor do they dispute that "'identical language may convey varying content' based on context." Br. 30 (quoting *Yates* v. *United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion)). Instead, they unsustainably attempt to minimize the role of practical and constitutional concerns in this Court's categorical-approach decisions. They note, for example, that the Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), viewed a categorical approach as "the 'only plausible' reading" of the provision of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), that included the clause that was later invalidated in *Johnson*. Br. 32 (quoting *Taylor*, 495 U.S. at 602). But *Taylor* focused primarily on the term "burglary," 18 U.S.C. 924(e)(2)(B)(ii), not any language of the sort at issue here, and its statement was preceded by the Court's determination that "the practical difficulties and potential unfairness of a factual approach" to classifying prior convictions "are daunting." 495 U.S. at 601.

Respondents repeatedly quote (Br. 2, 6, 10, 23, 32, 36) the *Dimaya* plurality's statement that 18 U.S.C. 16(b) "has no 'plausible' fact-based reading." *Dimaya*, 138 S. Ct. at 1218 (citation omitted). But that statement came alongside the plurality's observations that a "fact-based" approach would be "utter[ly] impracticab[le]" and "would generate its own constitutional questions." *Id.* at 1217-1218 (citation omitted); see *Johnson*, 135 S. Ct. at 2562. And to the extent that the Court's

decision in *Leocal*, *supra*, held that an ordinary-case categorical approach applies to 18 U.S.C. 16(b), it treated the text as describing a "conviction," not the conduct underlying a crime the jury is currently considering. 543 U.S. at 7; cf. *Dimaya*, 138 S. Ct. at 1217 (plurality opinion) (describing *Leocal* in terms of prior convictions). At a minimum, nothing in the Court's precedents precludes looking at Section 924(c)(3)(B) with fresh eyes before adopting a contextually anomalous and constitutionally fatal interpretation.

b. Similarly, and contrary to respondents' contention (Br. 24-30), nothing in the history of Section 924(c) shows that Congress required—or necessarily even anticipated—such an interpretation. The reports addressing the relevant amendments to Section 924(c) contain no mention of the categorical approach or judicially imagined "ordinary cases." Respondents nonetheless insist that Congress implicitly mandated that approach because (1) it intended Section 924(c)(3)(B)'s subsection-specific "crime of violence" definition to march in lockstep with the general definition in Section 16(b), and (2) it necessarily understood Section 16(b) to incorporate the ordinary-case categorical approach, even in the context of jury trials. Each of those essential premises is incorrect.

First, although the original 1984 version of Section 924(c) relied on Section 16's definition of "crime of violence," Congress in 1986 intentionally *separated* the provisions by adding a new "crime of violence" definition for Section 924(c) that applied solely "[f]or purposes of this subsection." Firearm Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 104(a)(2)(F), 100 Stat. 457; see Gov't Br. 35-37. Respondents err in asserting (Br. 24) that, because the language of Section

924(c)(3)(B) is nearly identical to Section 16(b)'s, Congress's decision to sever the two provisions was meaningless. Courts generally presume "that Congress contemplates a change whenever it amends a statute," *United States* v. *Wilson*, 503 U.S. 329, 336 (1992), and respondents identify no reason for the decoupling other than to put the provisions on different tracks. Respondents posit that Congress might have added the new "crime of violence" definition because it was adding a new definition of "drug trafficking crime." Br. 27 (citation omitted). But in the same legislation, Congress added a new definition of "drug trafficking crime" to 18 U.S.C. 929 *without* adding a subsection-specific "crime of violence" definition. See FOPA § 108, 100 Stat. 460; Gov't Br. 37.

The natural inference from the differential treatment of Sections 924 and 929 is that Congress wanted Section 924(c)'s subsection-specific "crime of violence" definition to stand on its own, without the need to consider the interpretation and application of Section 16 in unrelated contexts, including the classification of prior convictions. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Respondents err in suggesting (Br. 32) that such severance was unnecessary because Section 16 initially applied primarily to "present offenses." Respondents' account (Br. 26, 31-32) disregards that, for example, the Sentencing Commission was required to incorporate into the Sentencing Guidelines enhanced penalties for defendants with prior convictions for "crime[s] of violence," Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 217(a), 98 Stat. 2021 (28 U.S.C. 994(h)), and that courts were required to determine whether juvenile offenders had prior convictions for "crime[s] of violence," Comprehensive Crime

Control Act of 1984, Pub. L. No. 98-473, Tit. II, Pt. A, § 1202, 98 Stat. 2151 (18 U.S.C. 5038(f)).

Even assuming Congress specifically intended a categorical approach to Section 16, its decision to sever Section 924(c) from Section 16 invites a context-specific construction of Section 924(c)(3)(B) tailored to the "purposes of [Section 924(c)]," 18 U.S.C. 924(c)(3). Respondents' reliance (Br. 14) on *Clark* v. *Martinez*, 543 U.S. 371 (2005), in which the Court determined that a *single* instance of language in a *single* provision could not simultaneously have two different meanings, *id.* at 378, is misplaced. The "presumption that identical words * * * are intended to have the same meaning * * * is not rigid and readily yields whe[re] there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed * * * with different intent." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 (2004) (citations omitted). Here, Congress extensively rewrote Section 924(c), including by adding its own specific definition of "crime of violence," appearing in the context of a provision requiring a jury trial. Had Congress, irrespective of context, wanted Section 16 to define "crime of violence" under Section 924(c), it would have left Section 16 as the definition of "crime of violence" under Section 924(c).

Second, even if respondents were correct that a fresh-grown provision *could* "bring[] the old soil with it," Br. 28 (citation omitted), Congress here would not have been certain of the old soil's consistency. The ordinary-case categorical approach was far from well-established when Congress enacted Section 924(c)(3)(B). See Gov't Br. 35-37. Respondents identify (Br. 26-27, 31) only *one* per curiam circuit decision, *United States*

v. *Diaz*, 778 F.2d 86 (2d Cir. 1985), that had directly considered the application of Section 16(b) before Congress enacted Section 924(c) in May 1986. That "represent[s] neither a settled judicial construction, * * * nor one which [a court] would be justified in presuming Congress * * * impliedly approved," *United States* v. *Powell*, 379 U.S. 48, 55 n.13 (1964). To the contrary, the enactment of Section 924(c)(3)(B) was explicitly meant to *abrogate Diaz*'s holding (that drug trafficking crimes were not "crime[s] of violence"). See 132 Cong. Rec. E1390-02 (1986); 131 Cong. Rec. S16903-03 (1985). Nipping that decision in the bud cannot be viewed as codifying it in any respect.

Even after Section 924(c)(3)'s enactment, both the Sentencing Commission and, in some cases, the government continued to read the relevant language to invite a circumstance-specific approach. See, *e.g.*, Sentencing Guidelines § 4B1.2 comment. (n.1) (1988); Gov't Br. 4-15, *United States* v. *Springfield*, 829 F.2d 860 (9th Cir. 1987). Respondents note (Br. 29-30) that *later* Congresses have not intervened in the general adoption of the ordinary-case categorical approach to Sections 16(b) and 924(c)(3)(B). But "'congressional inaction lacks persuasive significance' in most circumstances," *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (brackets and citation omitted), including this one. Particularly once this Court endorsed the ordinary-case categorical approach in *James* v. *United States*, 550 U.S. 192, 208 (2007), subsequent Congresses had little reason to make an affirmative legislative effort to end an approach that appeared to be constitutional and functioned in practice to ensure that many criminals were held responsible for their use of firearms in violent crimes.

c. Respondents' efforts (Br. 35-36) to lump Section 924(c)(3)(B)'s subsection-specific definition of "crime of violence" together with not only Section 16(b), but also various other provisions that contain similar language, illustrates the pitfalls of an undifferentiated and context-free approach to statutory interpretation. Respondents would have this Court declare *all* of those statutes unconstitutional alongside Section 924(c)(3)(B), without any evidence that Congress intended them to incorporate an ordinary-case categorical approach either.

For example, respondents call into question (Br. 26, 32, 35) a portion of the Bail Reform Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, that requires a pretrial detention hearing on the government's motion "in a case that involves * * * a crime of violence," 18 U.S.C. 3142(f)(1)(A), and contains a standalone definition of "crime of violence" that mirrors the one at issue here, 18 U.S.C. 3156(a)(4). Although courts have generally viewed that provision through the pervasive categorical lens, see, *e.g.*, *United States* v. *Singleton*, 182 F.3d 7, 10-11 & nn.3-4 (D.C. Cir. 1999), the language itself does not compel that result, and it is far from clear that Congress intended it. Rather, the legislative history indicates that Congress wanted to empower judges "to make honest and appropriate decisions regarding the release" of pretrial defendants based on an assessment of "offense and offender characteristics," and to permit the detention of defendants who are "demonstrably dangerous." S. Rep. No. 225, 98th Cong., 1st Sess. 5, 7, 10 (1983) (Senate Report); see *id.* at 21.

Other statutes cited by respondents (Br. 35-36) are even more unhelpful to their position. For instance, 18 U.S.C. 4042(b)(3), which requires the Bureau of Pris-

ons to notify local law enforcement of the release of prisoners convicted of "crime[s] of violence (as defined in [S]ection 924(c)(3))," was not enacted until 1994, eight years after Section 924(c)(3)(B). Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. II, § 20417, 108 Stat. 1834-1835. Furthermore, the Bureau of Prisons initially construed it to include offenses that did *not* categorically satisfy Section 924(c)(3)(B)'s "crime of violence" definition; courts disagreed based on their own categorical construction of Section 924(c)(3). See, *e.g.*, *Royce* v. *Hahn*, 151 F.3d 116, 123-124 (3d Cir. 1998). Respondents' reliance (Br. 36) on 18 U.S.C. 25(b) and 119(a) is even further afield, as those statutes not only postdate Section 924(c)(3)(B) but expressly cross-reference *Section 16's* "crime of violence" definition. Court Security Improvement Act of 2007, Pub L. No. 110-177, Tit. II, § 202(a), 121 Stat. 2536 (18 U.S.C. 119); PROTECT Act, Pub. L. No. 108-21, Tit. VI, § 601(a), 117 Stat. 686 (2003) (18 U.S.C. 25).

B. The Constitutional-Avoidance Canon Requires Construing Section 924(c)(3)(B) To Incorporate A Circumstance-Specific Approach

Respondents' insistence that Section 924(c)(3)(B), along with other provisions of the federal criminal code, *must* be interpreted as unconstitutionally vague flouts the well-established canon of constitutional avoidance. See Gov't Br. 44-53. A circumstance-specific approach that avoids constitutional concerns is, at a minimum, "fairly possible," *Nielsen* v. *Preap*, No. 16-1363 (Mar. 19, 2019), slip op. 25 (citation omitted); see *id.* at 11 (Breyer, J., dissenting). Respondents' resistance to the constitutional-avoidance canon rests on both a misperception about the constitutionality of the circumstance-

specific approach and a misunderstanding of the constitutional-avoidance doctrine.

1. This Court made clear in both *Johnson* and *Dimaya* that it "'d[id] not doubt' the constitutionality of applying" a "'substantial risk'" standard like Section 16(b)'s "'to real-world conduct,'" rather than to "'a judge-imagined abstraction.'" *Dimaya*, 138 S. Ct. at 1215-1216 (quoting *Johnson*, 135 S. Ct. at 2558, 2561). Respondents nevertheless assert (*e.g.*, Br. 42) that basing a defendant's criminal culpability on the risk created by his actual conduct—as many criminal statutes do, see *Johnson* Gov't Br. App. A-B—would itself raise constitutional fair-notice concerns. Thus, while respondents repeatedly tout a bill pending in Congress that would revise Section 924(c)(3)(B) to include "fact-specific language" (Br. 21; see Br. 46), they simultaneously suggest that even that clarifying amendment—along with many other state and federal statutes—would be unconstitutionally vague. Accord National Assoc. of Fed. Defenders (NAFD) Amicus Br. 11-20.

Respondents' mistrust of juries cannot be squared with this Court's repeated observation that a risk-based standard applied to actual facts poses no fair-notice (or other constitutional) concern. "[T]he law is full of instances where a man's fate depends on his estimating rightly ... some matter of degree." *Johnson*, 135 S. Ct. at 2561 (quoting *Nash* v. *United States*, 229 U.S. 373, 377 (1913)); see *Dimaya*, 138 S. Ct. at 1217 (plurality opinion). The Court held the ACCA's residual clause and Section 16(b) unconstitutionally vague precisely *because* those statutes incorporated an ordinary-case categorical approach that "offers significantly *less* predictability than one that deals with the actual . . . facts." *Dimaya*, 138 S. Ct. at 1214-1215 (quoting *Johnson*,

135 S. Ct. at 2561) (emphasis added). Because the circumstance-specific approach to Section 924(c)(3)(B) is "far more precise," *United States* v. *Simms*, 914 F.3d 229, 280 n.6 (4th Cir. 2019) (en banc) (Richardson, J., dissenting), and thus far more "predictabl[e]," *Dimaya*, 138 S. Ct. at 1214, than the ordinary-case categorical approach, it is entirely constitutional.

It is much more consistent with fairness and notice principles to hold a defendant criminally liable for his *actual* conduct, than for the imaginary conduct involved in the judicially invented ordinary case of the crime. Defendants may commit offenses that might "ordinarily" be violent in nonviolent ways. For example, while several courts have held that sex trafficking of a minor, in violation of 18 U.S.C. 1591(a), is a crime of violence under the ordinary-case approach, see *United States* v. *Jackson*, 865 F.3d 946 (7th Cir. 2017), vacated, 138 S. Ct. 1983 (2018), the government has conceded that in certain cases, a jury applying the circumstance-specific approach could find that Section 924(c)(3)(B)'s substantial-risk threshold is not met, Gov't Br. at 37, *Jackson*, *supra* (Oct. 15, 2018) (No. 15-3693). Similarly, while many circuits have held that conspiracy to commit a "crime of violence" is itself a crime of violence under an ordinary-case approach, see *United States* v. *Turner*, 501 F.3d 59, 66 (1st Cir. 2007), cert. denied, 552 U.S. 1243 (2008), conspiracies that remain largely inchoate would not satisfy a circumstance-specific interpretation of Section 924(c)(3)(B), see *Douglas*, 907 F.3d at 16.

As a result, and contrary to respondents' assertion (Br. 42), the circumstance-specific approach would not create "arbitrary-enforcement problems." As discussed above (see pp. 6-7, *supra*), Section 924(c) would not apply "to every felony prosecution where a gun was

found, used, or possessed," Resp. Br. 42. The presence of a gun does not itself make offense conduct that is "by its nature" nonviolent—*e.g.*, hacking into a government database from a home computer—into a "crime of violence." And contrary to the objections of respondents and their amici (Br. 34, 41-42; National Assoc. of Criminal Def. Lawyers Amicus Br. 9), nothing suggests that juries—which are "presumed to follow [their] instructions," *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000), and which have resolved "similar questions" "for centuries," *Ovalles* v. *United States*, 905 F.3d 1231, 1250 n.8 (11th Cir. 2018) (en banc)—would be unable to determine the riskiness of a defendant's conduct under Section 924(c).

2. Respondents' efforts to circumvent the constitutional-avoidance doctrine not only advance a constitutional theory that would invite a flood of vagueness challenges to statutes that require juries to gauge the riskiness of real-world conduct, but also misinterpret the doctrine itself. Respondents conflate the constitutional-avoidance canon with the rule of lenity—and then misapply them both.

This Court "adhere[s] to th[e] principle" of constitutional avoidance not to favor criminal defendants, but "'out of respect for Congress, which [the Court] assume[s] legislates in the light of constitutional limitations.'" *Jones* v. *United States*, 526 U.S. 227, 239-240 (1999) (citation omitted); see, *e.g.*, *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 205 (2009). The Court has accordingly recognized that criminal statutes should not be interpreted to invite vagueness concerns—even when (unlike here, see pp. 20-21, *infra*) avoiding such concerns would clearly broaden the statute's scope. See, *e.g.*, *United States* v.

Grace, 461 U.S. 171, 176 (1983) (noting that broad construction of statute avoided vagueness concerns); *United States* v. *Culbert*, 435 U.S. 371, 374 (1978) (rejecting narrowing construction that might introduce vagueness); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82 (1932) (refusing to render statute vague by reading exception into prohibitory text).

As the government's opening brief explains (Br. 48-53), the separation-of-powers rationale for constitutional avoidance is furthered by interpreting Section 924(c)(3)(B) in a manner that does not render it unconstitutionally vague. Respondents cannot meaningfully dispute that invalidating Section 924(c)(3)(B) will inundate courts with collateral-review petitions by some of the most dangerous federal prisoners and will frustrate efforts to prosecute current and future violent criminals, notwithstanding Congress's efforts. Respondents attempt to minimize the problem by asserting (Br. 38) that "[m]ost" Section 924(c) crime-of-violence prosecutions "are covered by" the alternative definition in Section 924(c)(3)(A). But they offer no empirical support for that assertion; the government is aware of none; and it disregards Congress's explicit judgment that Section 924(c)(3)(A) alone is insufficient to identify the dangerous criminals who employ firearms in connection with violent crimes. Respondents likewise disregard Congress's judgment when they assert (Br. 38-39) that because such criminals can be prosecuted for their underlying crimes, Section 924(c) convictions are unnecessary to provide sufficient punishment. Congress specifically expressed its desire to combat the use of guns during violent crimes with "an offense *distinct* from the underlying felony," Senate Report 312 (emphasis added), that

requires a mandatory consecutive sentence, see 18 U.S.C. 924(c)(1)(D)(ii); Senate Report 312-313.

Respondents' invocation (Br. 43-44) of the rule of lenity to supersede constitutional avoidance is misguided. First, as respondents note (Br. 44), vagueness and lenity are "related manifestations of the fair warning requirement," *United States* v. *Lanier*, 520 U.S. 259, 266 (1997), which would be ill-served if lenity itself required construing a statute to be unconstitutionally vague. The rule of lenity is a canon of last resort to *resolve* "grievous ambiguity," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998), not to create it. Second, for reasons discussed above (see pp. 16-18, *supra*), a substantial-risk inquiry that focuses on a defendant's *own* conduct does not raise any fair-warning concerns. To the extent that respondents and their amici claim that defendants would lack fair warning under a circumstance-specific approach simply because it is not the one that lower courts adopted before *Dimaya*, they provide no support for the proposition that the statutory constructions of lower courts would preclude this Court from correcting course. See also p. 23, *infra*.

Third, even assuming some principle required interpreting Section 924(c) to apply to the fewest defendants, regardless of whether that construction would be constitutionally valid, "the 'ordinary case' approach is not inherently 'narrower' than the case-specific approach." *Simms*, 914 F.3d at 280 n.6 (Richardson, J., dissenting). "[S]ome defendants" would be guilty of a Section 924(c) offense under each interpretation who would not be guilty under the other, and particularly in light of the now-apparent vagueness of the ordinary-case categorical approach, one "cannot as an empirical matter rea-

sonably identify" which group is "larger." *Ibid.* (emphasis omitted). Indeed, a defendant who committed an "ordinarily" violent crime in a nonviolent way, but was convicted under Section 924(c) nonetheless, would surely invoke constitutional avoidance and the rule of lenity to urge exactly the circumstance-specific construction that respondents here assert to be implausible.*

C. Respondents' Section 924(c) Convictions Should Be Reinstated

Under the proper circumstance-specific construction of Section 924(c)(3)(B), respondents' convictions should be upheld. Respondents do not seriously dispute that a jury correctly instructed on the circumstance-specific approach to Section 924(c)(3)(B) would have found them guilty. See Gov't Br. 53-54. Instead, respondents contend (Br. 49) that applying the circumstance-specific approach here would create "constitutional violations that resist harmless error analysis." This Court, however, has "recognized that 'most constitutional errors'"—including the only one that occurred here—"'can be harmless.'" *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (citation omitted).

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* Respondents briefly mention (Br. 52), but do not advance, an "always-a-risk" approach to Section 924(c)(3)(B). See *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring in part and concurring in the judgment); FAMM Amicus Br. 6-26. Although that approach would be constitutional, it is inconsistent with the statute. The only always-present commonalities among different crimes under the same statute are the statutory elements. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). Had Congress wanted an elements-based inquiry in Section 924(c)(3)(B), it would have modeled it after (or folded it into) the "element[s]"-based inquiry of Section 924(c)(3)(A). See *Russello*, 464 U.S. at 23.

The only error was the failure to submit the crime-of-violence element to the jury, which is subject to harmless-error analysis under *Neder*, 527 U.S. at 8-13. Respondents suggest (Br. 50-51) that *Neder*'s harmless-error analysis is inapplicable, on the theory that the district court here "directed a verdict" on the crime-of-violence element. But *Neder* specifically explains that "conclusive presumptions, which direct the jury to presume an ultimate element of the offense," are subject to harmless-error review. 527 U.S. at 10 (emphasis omitted); see *id.* at 12, 17.

Respondents' attempt (Br. 49-50) to transform the *Neder* error into an error in the indictment is unsound. The "crime of violence element," *Rodriguez-Moreno*, 526 U.S. at 280, of the relevant Section 924(c) offense was alleged in the indictment—including with a cross-reference to the specific facts of the crime. C.A. ROA 17. Thus, even assuming the omission of an element from the indictment were not subject to harmless-error analysis, see *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 104 (2007) (reserving that issue), the indictment here was constitutionally valid because it provided adequate notice and enough information to plead double jeopardy to a subsequent prosecution. See *id.* at 108.

Respondents likewise err in suggesting (Br. 50) that the *Neder* error here is akin to "adopt[ing] a[n entirely] different definition of the offense * * * from that given the jury by the trial court," *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966). Contrary to respondents' assertions (Br. 49, 51), they had every incentive and opportunity to contest the facts relevant to the crime-of-violence determination, which were the same facts that established respondents' violations of the Hobbs Act,

18 U.S.C. 1951. Respondents' amici are similarly incorrect in their assertion (NAFD Amicus Br. 21) that affirmance here would impermissibly "punish [respondents] for pre-ruling conduct that would not have violated § 924(c) at the time it was committed." This Court's definitive construction of Section 924(c) would explicate the statute's meaning "before as well as after [its] decision." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994); see, *e.g.*, *Scales* v. *United States*, 367 U.S. 203, 224 (1961) (rejecting defendant's attempt to avoid criminal liability by relying on a construction of the statute that he asserted to be vague). That meaning should not be one that deviates from the traditional rule holding a defendant responsible for his own jury-found acts, hinges criminal liability on a judge-imagined abstraction, and renders the statute unconstitutionally vague.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed, or, alternatively, vacated and remanded with instructions to permit a retrial.

Respectfully submitted.

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APRIL 2019

No. 18-431

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF FOR FAMM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)'s residual clause is—like the identical residual clause in § 16(b)—unconstitutionally vague because it requires an ordinary-case categorical approach to identifying a "crime of violence."

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INTEREST OF AMICUS CURIAE[1]

Amicus FAMM (formerly known as Families Against Mandatory Minimums) is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies and to challenge mandatory sentencing laws and the inflexible and excessive penalties they require. Founded in 1991, FAMM currently has more than 50,000 members around the country. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected *amicus* filings in important cases.

FAMM submits this brief cognizant of the toll mandatory minimums exact on its members in prison, their loved ones, and our communities. The court of appeals correctly recognized that the residual clause of Section 924(c)(3)(B) is unconstitutionally vague because it fails to provide fair warning of what conduct can subject individuals to harsh mandatory minimum sentences. In light of the grave harm wreaked by these sentences, FAMM is keenly interested in ensuring they be used sparingly and only in accordance with due process.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no one other than *amicus* and its counsel made a monetary contribution to fund the preparation or submission of this brief. Petitioner and Respondents have both received timely notice and have granted consent to the filing of this brief pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

Section 924(c)(3) defines a "crime of violence" as "an offense that is a felony and"

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). This Court's teachings make clear that "'[t]he only plausible interpretation'" of analogous language in the Armed Career Criminal Act (ACCA) "'requires'" an ordinary-case, "'categorical approach'—even if that approach could not in the end satisfy constitutional standards." *Sessions v. Dimaya*, 584 U.S. —, 138 S. Ct. 1204, 1217 (2018) (plurality op.) (quoting *Johnson v. United States*, 576 U.S. — , 135 S. Ct. 2551, 2562 (2015)). "The same is true . . . except more so" with respect to Section 16's residual clause, which is identical to the residual clause in Section 924(c) in every material respect. *Id.* As with the residual clauses in the ACCA and Section 16, Section 924(c)'s residual clause must be invalidated as unconstitutionally vague. *See* Resp. Br. 12–24.

Although Section 924(c)'s residual clause requires a categorical, ordinary-case approach, if the Court decides it must look elsewhere, the only possible alternative is Justice Gorsuch's suggestion that the clause may be read as looking to what the "crime of conviction *always*" entails. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring). Especially when modifying the generic word "offense," the phrase "by its nature"

must refer to an inherent characteristic of an offense; it cannot refer to case-specific conduct. This "always-a-risk" approach also avoids additional constitutional concerns that the government's proposed conduct-based approach raises. If the Court rejects the ordinary-case construction, it should adopt always-a-risk instead.

Under the always-a-risk approach, Respondents' Section 924(c) convictions for Hobbs Act conspiracy must be vacated. Hobbs Act conspiracy requires only "proof that [the defendant] reached an agreement" to commit robbery. *Ocasio v. United States*, 578 U.S. — , 136 S. Ct. 1423, 1436 (2016). Accordingly, many Hobbs Act conspiracy convictions—such as those involving fake stash-house stings or agreements without subsequent unlawful action—do not involve a substantial risk of physical force against others. Because Hobbs Act conspiracy does not always involve a substantial risk that force may be used against others, it is not a crime of violence under Section 924(c).

The Court should affirm the decision below.

ARGUMENT

I. SECTION 924(c)'S RESIDUAL CLAUSE REQUIRES AN ORDINARY-CASE APPROACH.

This Court has previously construed two residual clauses—in the ACCA and in Section 16—that are indistinguishable from Section 924(c)'s residual clause. With respect to the ACCA's residual clause, the Court held that "'[t]he only plausible interpretation' . . . requires use of the categorical approach," under which a court looks to what an offense ordinarily entails. *Johnson v. United States*, 576 U.S. — , 135 S. Ct. 2551, 2562 (2015) (discussing

18 U.S.C. § 924(e)(2)(B)). As for Section 16's residual clause—which is identical to Section 924(c)'s residual clause—the Court held that "[t]he same is true here—except more so." *Sessions v. Dimaya*, 584 U.S. — , 138 S. Ct. 1204, 1217 (2018) (plurality op.) (discussing 18 U.S.C. § 16(b)); *accord Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) (unanimously applying a categorical, ordinary-risk approach to Section 16(b)). And because both provisions required an ordinary-case approach, both were held unconstitutionally vague. *See Dimaya*, 138 S. Ct. at 1223 (majority op.); *Johnson*, 135 S. Ct. at 2557.

The same outcome—an ordinary-case approach—is warranted here too for several reasons. Most saliently, the use of the word "offense" in Section 924(c)(3) demands a categorical approach. That single word is distributed over *both* the elements clause (subsection (3)(A)) and the residual clause (subsection (3)(B)). Because "offense" indisputably refers to "the statute of conviction" in the context of the elements clause, *Taylor v. United States*, 495 U.S. 575, 601 (1990), it must also refer to the statute of conviction under the residual clause. It would be a "dangerous principle" for courts to "give the *same* statutory text different meanings in different cases." *Clark v. Martinez*, 543 U.S. 371, 386 (2005) (emphasis added).

An ordinary-case approach is further required by the phrase "by its nature." 18 U.S.C. § 924(c)(3)(B); *see* Resp. Br. 14–18. That language "tells courts to figure out what an offense normally—or, as [this Court] ha[s] repeatedly said, 'ordinarily'—entails." *Dimaya*, 138 S. Ct. at 1217–18; *see also Leocal*, 543 U.S. at 7 ("This language requires us to look to . . . the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime."). The

"upshot of all this textual evidence" is that Section 924(c)(3)(B)—like identical language in other statutes—"has no 'plausible' fact-based reading." *Dimaya*, 138 S. Ct. at 1218 (plurality op.) (quoting *Johnson*, 135 S. Ct. at 2562).

The government contends (at 44) that the canon of constitutional avoidance warrants charting a new course and adopting a fact-based approach. This Court has twice "decline[d] [that] invitation." *Johnson*, 135 S. Ct. at 2562; *see also Dimaya*, 138 S. Ct. at 1217 (plurality op.) ("[T]he avoidance canon cannot serve . . . as the interpretive tie breaker."). After all, statutory language cannot be "dynamic" and "mean one thing when enacted yet another [thing when] the prevailing view of the Constitution later change[s]." *Clark*, 543 U.S. at 382. Because "application of ordinary textual analysis" *requires* an ordinary-case approach here, the avoidance canon simply does not "come[ ] into play." *Jennings v. Rodriguez*, 583 U.S. — , 138 S. Ct. 830, 842 (2018).[2]

The constitutional defect in Section 924(c)(3)(B) "is the product of the law Congress has written. It is not for [this Court] to rewrite the statute . . . to achieve what [it] think[s] Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010). Rewriting the text under the guise of constitutional avoidance

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[2] The government's attempt (at 32) to cabin the categorical approach to statutes involving prior convictions fares no better. The government's view leaves unanswered what courts should do where a "crime of violence" determination must be made *before* trial under other statutes that employ materially identical language. *See, e.g., United States v. Rogers*, 371 F.3d 1225, 1228–29 (10th Cir. 2004) (discussing "crime of violence" determination for bail eligibility under 18 U.S.C. §§ 3142(f)(1)(A) and 3156(a)(4)(B)).

would allow legislators to "'abdicate their responsibilities for setting the standards of the criminal law.'" *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring) (citation omitted).

Accordingly, this Court should reject the government's invitation to revise Section 924(c)(3)(B). And because that provision is unconstitutionally vague under *Johnson* and *Dimaya*, Respondents' convictions under it were properly vacated. *See* Resp. Br. 12.

II. If The Court Reinterprets The Residual Clause, The Only Possible Alternative Is An Always-a-Risk Approach.

If the Court nevertheless concludes that it must reinterpret the statutory language, it should reject the government's conduct-based approach. There is only one possible alternative interpretation of Section 924(c)'s residual clause: As Justice Gorsuch suggested in his *Dimaya* concurrence, that clause could require courts to decide "whether the defendant's crime of conviction *always* . . . 'involves a [substantial] risk of physical force,'" rather than whether it *ordinarily* does so. 138 S. Ct. at 1233.

The text, history, and purpose of Section 924(c)'s residual clause show that, as between an always-a-risk approach and the government's conduct-based approach, the latter must be rejected.

A. The Statutory Text Requires Analysis of a Generic Offense.

When interpreting a statute, this Court "begin[s], as always, with the text." *Esquivel-Quintana v. Sessions*, 581 U.S. — , 137 S. Ct. 1562, 1568 (2017). Here, the relevant language is "an offense . . . that by

its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B).

"Best read," this language "tells courts to figure out what an offense normally . . . entails." *Dimaya*, 138 S. Ct. at 1217–18 (plurality op.); Resp. Br. 13–22. The "nature" of the offense could also potentially tell courts to figure out what the "crime of conviction *always*" entails. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring). Contrary to the government's argument (at 20–33), however, the text cannot refer to what the offense entails in a specific case. Indeed, the government never explains why Congress would choose such a convoluted route to reach that straightforward result.

1. The residual clause unmistakably requires a court to look at an offense in the abstract. An always-a-risk-approach would be consistent with this language; the government's interpretation would not.

The key language is Section 924(c)(3)'s reference to an "offense . . . by its nature." This Court has repeatedly held that a "[s]imple reference[ ]" to an "offense"—without more—is "'read naturally' to denote the 'crime as *generally* committed.'" *Dimaya*, 138 S. Ct. at 1217 (plurality op.) (quoting *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009)). Section 924(c)(3) includes that simple reference: It mentions "offense" only generally, without any added language specifying the circumstances of conviction. The phrase "by its nature" "make[s] that meaning all the clearer," for it "entails, not what happen[s] to occur on one occasion," but what occurs in the abstract offense. *Id.* at 1217–18.

The modifying phrase "by its nature" is "[b]est read" as "tell[ing] courts to figure out what an offense

normally . . . entails." *Dimaya*, 138 S. Ct. at 1217–18 (plurality op.). But it could also "refer to an *inevitable* characteristic of the offense." *Id.* at 1233 (Gorsuch, J., concurring) (emphasis added). The government concedes that the definition of "nature" is "the basic or inherent feature[ ], character, or qualit[y] of something." U.S. Br. 30 (ultimately quoting *Oxford Dictionary of English* 1183 (3d ed. 2010)). The "nature" of something is its "fundamental" quality or "essence." *Webster's Third New International Dictionary* 1507 (1976). In other words, the residual clause could mean that a "crime of conviction *always*" involves a substantial risk of physical force. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring).

As with the ordinary-case approach, an always-a-risk approach harmonizes the statute by ensuring that the single word "offense" means the same thing in both the elements and residual clauses. The always-a-risk approach ensures that courts always make a "crime of violence" determination based on the crime of conviction—by looking to the elements of the offense in subsection (3)(A) and the inherent qualities of that offense in subsection (3)(B). If an offense lacks as an element the use, attempted use, or threatened use of physical force against the person or property of another, it nevertheless may satisfy the residual clause because its commission always involves a substantial risk that such force "may be used." 18 U.S.C. § 924(c)(3)(B). For example, certain offenses that lack an element of force because they can be committed by means of persuasion or fraud—*e.g.*, kidnapping, *id.* § 1201, or sex trafficking of a minor, *id.* § 2422(b)—may yet always involve a substantial *risk* that force may be used.

An always-a-risk approach is also consistent with case law construing the "nature" of an offense as its essential qualities in the abstract. For example, the Bail Reform Act provides for detention hearings where the case involves "any other offense that is a felony and that, by its nature, involves a substantial risk" of physical force. 18 U.S.C. § 3156(a)(4)(B) (definition of "crime of violence" as used in 18 U.S.C. § 3142(f)(1)(A)). "[T]he majority" of courts to construe the pretrial-detention statute have held that "the possibility of force must result from the nature of the elements of the offense rather than from the particular way that the defendant allegedly committed the crime." *Rogers*, 371 F.3d at 1228 n.5.

Similarly, the statutory definition of "serious violent felony" includes "any other offense" punishable by up to ten or more years in prison that has a force element "or that, by its nature, involves a substantial risk" of physical force. 18 U.S.C. § 3559(c)(2)(F)(ii) ("three strikes" provision). Based on that language, courts have looked to the generic nature of the offense—not the factual particulars of the defendant's conduct. *See, e.g.*, *United States v. Abraham*, 386 F.3d 1033, 1037–38 (11th Cir. 2004).

2. The government suggests that an "offense" "by its nature" refers to "'an offender's actual underlying conduct.'" U.S. Br. 30–31 (citation omitted). On its view, "[t]wo violations of the same criminal statute can have very different natures." *Id.* That counterintuitive result is as good a sign as any that the government's interpretation is wrong from the start.

a. To begin, the government's approach implausibly requires reading the phrase "offense that is a felony" as referring to a generic offense in Section

924(c)(3)(A) yet to the specific circumstances of the defendant's conviction in Section 924(c)(3)(B). What makes an "offense" a "felony" are its elements, not the specific circumstances of the defendant's conduct. Nor can the word "offense" have one meaning at the beginning of the sentence and transform into another meaning before the end of the same sentence. A textual interpretation that requires a *single* word to mean two different things depending on which clause of the statute applies is not plausible. *See Clark*, 543 U.S. at 378 ("To give the[ ] same word[ ] a different meaning for each category would be to invent a statute rather than interpret one.").

The government's approach misconstrues not just the word "offense," but also the word "nature." The "nature" of an "offense" cannot plausibly change depending on factual circumstances. According to contemporary dictionary definitions, a characteristic that appears in only some instances, but not others, is not a "fundamental" or "inherent" quality of an offense. *See Webster's Third New International Dictionary* 921 (1976) (defining "fundamental" as "constituting a necessary or elemental quality, part, or condition; indispensable"); *Black's Law Dictionary* 703 (5th ed. 1979) (defining "inhere" as "[t]o exist in and inseparable from something else"). It therefore cannot be part of the "nature" of the offense.

The government only proves this point with its examples of conspiracy to commit arson "of a rival gang's headquarters" and conspiracy to commit arson of "one's own property for insurance money." U.S. Br. 31. It makes little sense to say that, by its nature, the former "offense" involves a risk of physical force but the latter does not. There is no separate "offense" for conspiracy to commit arson of a rival gang's

headquarters, just as there is no "offense" for conspiracy to commit arson of one's own property for insurance money. There is only a single "offense"—conspiracy to commit arson—and the nature of that *offense* does not change from one case to another, even if the underlying offense *conduct* changes.

In addition to rewriting two words in the statute, the government's approach makes the entire phrase "by its nature" superfluous. "'It is . . . a cardinal principle of statutory construction that [this Court] must give effect, if possible, to every clause and word of a statute.'" *NLRB v. SW Gen., Inc.*, 580 U.S. — , 137 S. Ct. 929, 941 (2017) (ellipsis in original; citation omitted). Yet the government's approach gives no effect to the phrase "by its nature." Because the word "offense" *already* connotes a conduct-specific approach (on the government's view), the phrase "by its nature" does no work. The statute would mean the same thing if it referred to, simply, "an offense that is a felony and . . . involves a substantial risk" of physical force. 18 U.S.C. § 924(c)(3)(B).

The government suggests (at 27–29) that the word "involves" further supports a conduct-based approach here. But when a statute uses such "an elastic word," this Court "construe[s] [the] language in its context and in light of the terms surrounding it." *Leocal*, 543 U.S. at 9. Here, the subject of the verb "involves" is "offense," and the verb "involves" is modified by the phrase "by its nature." That context makes clear that "involves" does not intend a conduct-based approach. If anything, the repeated use of the present tense—"involves" a risk that physical force "may be used," as opposed to "involved" a risk that physical force "may have been used"—confirms that the statute refers to

the generic offense, not the defendant's historical conduct. *See* Resp. Br. 20–21.

b. The government's interpretation not only rewrites the statutory text, but also runs roughshod over the statutory context by fusing the two acts necessary to commit a Section 924(c) offense. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (citation omitted)).

A Section 924(c) offense is a "combination crime" that requires both the possession of a gun and the commission of a crime that is independently a "crime of violence." *Rosemond v. United States*, 572 U.S. 65, 75 (2014). In other words, it is "a freestanding offense distinct from . . . just . . . using a gun." *Id.* Congress chose, with its enactment of Section 924(c), to "set[ ] out an offense distinct from the underlying felony"; it "is not simply a penalty provision." S. Rep. No. 98-225, at 312 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3490.

The government's conduct-based approach collapses that well-established distinction. Under the government's view, just carrying a gun could be the very reason that an offense is deemed a crime of violence. Virtually *any* felony—even inherently nonviolent felonies—could be found to involve a substantial risk of physical force against another if committed while armed, particularly when one considers the victim's potential reaction or resistance. That would effectively transform Section 924(c) into a penalty provision.

3. The government never explains *why* Congress would have written the residual clause in such a roundabout way if that clause means what the government says. Had Congress intended a conduct-based analysis here, "it presumably would have said so; other statutes, in other contexts, speak in just that way." *Descamps v. United States*, 570 U.S. 254, 267–68 (2013).

a. The government posits (at 53) that Congress created the residual clause for conduct that is "*actually* violent." But under the government's own view, that is the one thing Congress failed expressly to say. Subsection (3)(A) indisputably covers only generic crimes with certain elements, and, in the government's view, subsection (3)(B) reaches *specific* conduct that "by its nature" poses a "substantial risk" that force "may be used." 18 U.S.C. § 924(c)(3)(B). But if Congress wanted the government's conduct-specific approach, it omitted a provision expressly covering persons who actually use physical force in the commission of their crimes. The statute is missing a third prong that reads simply: "an offense that is a felony" and "the defendant used physical force against the person or property of another in the course of committing the offense."

It boggles the mind that Congress would have expressed the straightforward idea that courts should look to what the defendant actually did by (1) requiring the single word "offense" to mean two different things; (2) including an unnecessary phrase that strains the meaning of the word "nature"; (3) foregoing "the defendant used physical force" (or even "the offense involved the use of physical force") in favor of an offense that "involves a substantial risk" that physical force "*may* be used"; and (4) leaving

unexplained how a crime of violence remains distinct from simply using or carrying a gun.

Making matters worse is the government's suggestion that Congress's placement of the words "by its nature" has "the practical effect of limiting the jury's inquiry to the *offense*, rather than the *offender*." *See* U.S. Br. 31. Under that view, where the defendant actually uses force in committing an offense that lacks a force element under subsection (3)(A), the jury would have to parse whether the "particular conduct in violation of federal law," *id.* at 30, resulted from the violent nature of the *offense*, without factoring in the nature of the *offender*. The government never explains why Congress would create a statute that requires a jury to draw such fine distinctions. Moreover, if Congress really had intended to enact a case-specific approach that examines the defendant's actual conduct, it created a gaping hole for cases where the "offense" is not violent "by its nature" (*e.g.*, arson of "one's own property for insurance money," *id.* at 31), but is committed in a violent way (*e.g.*, by recklessly wielding a flamethrower).

b. The government fails to identify, and *amicus* has not found, a single statute that similarly uses the generic words "offense" and "by its nature" to adopt a conduct-based approach. In fact, when the government itself *has* chosen a conduct-based approach, it has expressly used the word "conduct"—not "by its nature." *See, e.g.*, 28 C.F.R. § 550.58 (prohibiting early release for inmates who committed a felony "[t]hat by its nature *or conduct*, presents a serious potential risk of physical force" (emphasis added)). The inclusion of both "by its nature" and "conduct" is a sure sign that they mean different

things. *See Bush v. Pitzer*, 133 F.3d 455, 458 (7th Cir. 1997) ("Conspiracy does not by its 'nature' present a serious risk; but Bush's 'conduct' did so.").

The government relies (at 27–29) on a smorgasbord of other statutes. But each statute uses the sort of conduct-specific "language that almost certainly ... refers to specific circumstances," *Nijhawan*, 557 U.S. at 37—and that Section 924(c)(3)(B) assuredly lacks.

Take, for example, the sentencing-enhancement provisions the government cites. The penalties for importation, manufacture, distribution or storage of explosive materials provide a sentencing enhancement for "conduct" that "creates a substantial risk of injury to any person." 18 U.S.C. § 844(f)(2). The penalty provision for drive-by shootings similarly provides a sentencing enhancement for anyone who "in the course of such conduct"—*i.e.*, firing a weapon into a group of people—"causes grave risk to any human life." *Id.* § 36(b)(2); *see also id.* § 1365(a) (tampering with consumer products "under circumstances manifesting extreme indifference to such risk"). In addition to expressly denoting "conduct," these statutes specifically require that the conduct actually "cause" a grave or substantial risk of harm.

Section 924(c)'s residual clause is different. It does not include the word "conduct," and it refers only to a "substantial risk" that physical force "*may* be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B) (emphasis added). The use of the verb "may" indicates a hypothetical that will not necessarily materialize in a specific case, even if the risk is present in every case. By focusing on what could have happened, the statute necessarily steers

away from a conduct-based approach that requires looking at what actually happened.

All of the remaining federal statutes the government cites likewise refer to *specific conduct*—such as "theft" (18 U.S.C. §§ 666(b), 670(b)(2)(A)); "assault" (*id.* §§ 111(a), 351(e)); "fraud" (*id.* §§ 1028(b)(1)(D), 2118(a)); a "course of conduct" (*id.* §§ 43(a)(1), (2)(B)); or "manufacturing a controlled substance" (21 U.S.C. § 858)—that "involves" the use or threat of force. The state statutes, too, either expressly refer to the circumstances of the violation or include a *mens rea* element that signals the defendant's violation.[3]

No similar cues appear in Section 924(c)(3)(B). That provision neither contains a *mens rea* element nor refers to any "conduct" or specific circumstances.

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[3] *See* Ala. Code § 13A-6-2(a)(2) ("recklessly engages in conduct which creates a grave risk of death"); Conn. Gen. Stat. Ann. § 53a-112(a)(1)(A) ("with intent to destroy or damage a building"); Ind. Code Ann. § 35-43-4-2(a)(2) ("knowingly or intentionally exerts unauthorized control over property"); Iowa Code Ann. § 709.3(1)(a) ("[d]uring the commission of sexual abuse the person . . . uses or threatens to use force creating a substantial risk of death or serious injury to any person"); Mass. Gen. Laws Ann. ch. 265, § 13L ("wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child"); Md. Code Ann., Crim. Law § 3-1001(c) ("knowingly threaten to commit . . . a crime of violence . . . if as a result of the threat, regardless of whether the threat is carried out"); Mo. Stat. § 565.120(1) ("knowingly restrains another unlawfully and without consent . . . and exposes him or her to a substantial risk of serious physical injury"); Utah Code Ann. § 76-5-301(1)(b) ("intentionally or knowingly . . . detains or restrains the victim in circumstances exposing the victim to risk of bodily injury").

Although the provision requires that the offense involve a substantial risk of physical force that "may be used in the course of committing the offense," the bare phrase "committing the offense" is wholly generic. 18 U.S.C. § 924(c)(3)(B). As this Court has explained with respect to identical language in Section 16, "the absence of terms alluding to a crime's circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit." *Dimaya*, 138 S. Ct. at 1218 (plurality op.).[4]

If the text does not clearly require the ordinary-case approach, the only possible alternative is the always-a-risk approach.

B. A Conduct-Based Approach Conflicts with the Legislative History.

This Court has also looked to legislative history when construing similar provisions of the ACCA. *E.g.*, *Stokeling v. United States*, 586 U.S. —, 139 S. Ct. 544, 551 (2019); *Taylor*, 495 U.S. at 601. That legislative history is consistent with the always-a-risk approach and forecloses a conduct-based approach under Section 924(c)(3)(B). As this Court has explained, "[t]here was considerable debate over" which offenses to include when Congress enacted the ACCA (and simultaneously amended Section 924(c)), "but *no one* suggested that a particular crime might sometimes count towards enhancement and sometimes not,

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[4] The always-a-risk approach is not precluded by *James v. United States*, 550 U.S. 192 (2007), *overruled by Johnson*, 135 S. Ct. 2551. *James* involved a statute that defined a "violent felony" only by reference to a "serious *potential* risk of physical injury." *Id.* at 207 (emphasis added). Because Section 924(c)(3) does not include a "potential" qualifier, it can support an always-a-risk approach.

depending on the facts of the case." *Taylor*, 495 U.S. at 601 (emphasis added).

1. Nothing indicates that Congress intended two identical statutes—Sections 16(b) and 924(c)(3)(B)—to mean two quite different things.

Before 1984, Section 924(c) penalized using or carrying a firearm in relation to any federal felony. S. Rep. No. 98-225, at 312. In 1984, Congress amended Section 924(c) by limiting it to crimes of violence, while simultaneously defining the term "crime of violence" in Section 16. Pub. L. No. 98-473, §§ 1001(a) & 1005(a), 98 Stat. 1837, 2136 & 2138 (1984). Two years later, Congress copied Section 16's "crime of violence" definition into Section 924(c), with one slight change specifying that a *felony* offense was required under both clauses—not just the residual clause. *See* Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 449, 457 (1986). That minor tweak cannot justify a seismic shift toward a conduct-specific approach in Section 924(c). *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("'[I]dentical words used in different parts of the same act are intended to have the same meaning.'" (citation omitted)). "Congress . . . does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

Even within the 1984 bill, Congress demonstrated that it knew how to craft a provision requiring a conduct-based approach. The Bail Reform Act requires a judicial officer to "take into account the available information concerning—(1) the nature *and circumstances* of the offense charged, *including* whether the offense is a crime of violence or involves a narcotic drug." 98 Stat. at 1980 (emphases added). Congress thus plainly knew how to require

consideration of case-specific circumstances when it so wanted.

But Congress did not want that in Section 924(c). At the same time that Congress imported Section 16's "crime of violence" definition into Section 924(c), it expressly rejected an amendment to a different subsection of Section 924(c) that would have required "analysis of the defendant's conduct [and] the circumstances of the violent crime." H.R. Rep. No. 99-495, at 9 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 1327, 1335. The House Judiciary Committee feared this analysis would impose a "substantial burden on the prosecution." *Id.* That circumstance-specific analysis (and prosecutorial burden) would have already existed, however, if the government's conduct-based interpretation of the statute's "crime of violence" definition were correct. The Committee's report confirms that Section 924(c)(3)(B) has never required a conduct-based approach.

There are easy ways for Congress to craft a conduct-based approach if it so desires. In fact, a pending bill proposes one: strike the words "by its nature" from Section 924(c)(3)(B) and replace them with "based on the facts underlying the offense." H.R. 7113, 115th Cong., 2d Sess. § 2(a) (2018). It is for Congress, not this Court, to decide whether to rewrite the statute from the categorical "by its nature" approach to one "based on the facts underlying the offense." *Cf.* U.S. Br. 30 (seeking to equate "by its nature" with "'an offender's actual underlying conduct'" (citation omitted)).

2. Congressional reports accompanying the 1984 amendments further confirm that the residual clause of Section 924(c) refers to the crime of conviction, and cannot refer to a defendant's conduct.

The reports uniformly refer to the "offenses" mentioned in Section 924(c)(3) as generic, not case-specific crimes. For example, the Senate Report explained that Section 924(c) would "ensure that all persons who commit federal crimes of violence, including *those crimes set forth in statutes* which already provide for enhanced sentences for their commission with a dangerous weapon, receive a mandatory sentence." S. Rep. No. 98-225, at 313 (emphasis added). The Report further elaborated that the new definition of "crime of violence" would "expand[ ] the scope of *predicate offenses*, as compared with current law, by including some violent misdemeanors, but restrict[ ] it by excluding non-violent felonies." *Id.* at 425 n.818 (emphasis added); *see also id.* at 390 (explaining that "[p]rosecution may be sought" for juvenile offenses "if the offense charged is a crime of violence or one of four specified serious drug offenses"). These explanations would be incoherent if the "crime of violence" determination actually turned on case-specific circumstances.

The reports also repeatedly assumed that "offenses" either were crimes of violence or were not. The Senate Report, for example, explained the offenses that fell within the elements clause and residual clause, respectively: "The former category would include a threatened or attempted assault or battery on another person; offenses such as burglary . . . would be included in the latter category inasmuch as such an offense would involve the substantial risk of physical force." S. Rep. No. 98-225, at 307. There is no reason to think that the Senate intended these "categor[ies]" to be mutable based on the underlying facts of each case—much less that Congress signaled this result by shifting *sub silentio* from a "category" of generic offenses under the elements clause to a porous

"category" of case-specific offenses under the residual clause.

The legislative history is therefore consistent with an always-a-risk approach, but rules out a conduct-based approach.

C. A Conduct-Based Approach Conflicts with Congressional Purpose.

Unlike an always-a-risk approach, a conduct-based approach would also dramatically frustrate Congress's purpose in revising Section 924(c).

Congress amended the statute to *narrow* coverage from any felony to crimes of violence, S. Rep. 98-225, at 425 n.818, and then to felony crimes of violence, Pub. L. No. 99-308 § 104(a)(2), 100 Stat. 457. A conduct-based approach would do just the opposite, expanding the statute's harsh mandatory minimum penalties to traditionally nonviolent offenses. It could sweep in any felony where a gun was brandished, including paying a bribe (18 U.S.C. § 201); possessing forged citizenship documents (*id.* § 1426); or selling counterfeit art (*id.* § 2318). A conduct-based approach, in short, would kick open the door that Congress firmly shut.

This Court should be especially hesitant to read Section 924(c) broadly because mandatory-minimum provisions grant prosecutors immense power to extract guilty pleas to lesser offenses (or even offenses the defendant did not commit) from risk-averse defendants. Under a case-specific approach, a prosecutor would have discretion to charge a Section 924(c) violation for *every* felony offense with some nexus to possession of a gun. A conviction and sentence, in turn, could "guarantee the defendant a prison term of many decades" or even—"no fanciful

possibility"—a term that "outlast[s] the defendant's life and the lives of every person now walking the planet." *United States v. Smith*, 756 F.3d 1179, 1181 (10th Cir. 2014).

The power to charge this additional crime and threaten its mandatorily consecutive sentence "would predictably be used to induce a plea bargain to [a] lesser charge" from a risk-averse defendant. *United States v. Santos*, 553 U.S. 507, 516 (2008) (plurality op.), *see also* Richard A. Oppel, *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html ("[R]esearchers say the most important force in driving down the trial rate has been" the imposition of "mandatory sentences and other harsher and more certain penalties for many felonies . . . .").

Those defendants who are less risk-averse would lose incentives to plead guilty under a conduct-based approach. The advisory range for a Section 924(c) conviction is the statutory minimum, irrespective of whether the defendant accepts responsibility by pleading guilty. *See* U.S.S.G. §§ 2K2.4(b), 3E1.1. As a result, defendants with plausible arguments that their crimes presented no substantial risk of physical force would have little incentive to plead guilty. They would have every incentive to try, instead, to convince a jury that their actions did not satisfy the statute. *See* Richard T. Boylan, *The Effect of Punishment Severity on Plea Bargaining*, 55 J. L. & ECON. 565, 583 (2012) (finding positive correlation between punishment severity and probability of a trial).

In contrast, an always-a-risk approach, like the ordinary-case interpretation, furthers the purpose of Section 924(c) by narrowing the predicate offenses in

accordance with congressional intent and by preventing arbitrary enforcement. The purpose of Section 924(c) thus could support an always-a-risk approach, but not a conduct-based approach.

D. The Avoidance Canon Supports Only the Always-a-Risk Approach.

If the Court were to apply the avoidance canon to reinterpret Section 924(c)(3)(B), it should not adopt the government's conduct-based approach. Constitutional avoidance simply does not authorize adopting an implausible construction of the statute, especially when that construction conflicts with the rule against surplusage, the presumption of consistent usage, and the rule of lenity, while raising constitutional issues of its own. Rather, the only possible alternative would be to adopt the always-a-risk approach—which suffers from none of the same problems.

Because the conduct-based approach is an "implausible construction[ ]" of the statutory text, *see supra* II.A, it cannot be adopted under the avoidance canon. *Jennings*, 138 S. Ct. at 836 ("[A] court relying on that canon still must *interpret* the statute, not rewrite it."). Moreover, this Court has long refused to apply the avoidance canon when it would frustrate congressional intent and the overriding purposes of the statute. *See United States v. Locke*, 471 U.S. 84, 95–96 (1985); *Shapiro v. United States*, 335 U.S. 1, 31–32 (1948); *see also Jennings*, 138 S. Ct. at 843 ("Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases."). The conduct-based approach does both, while the always-a-risk approach does neither. *Supra* II.B–C.

Three other interpretive canons further foreclose the conduct-based approach here. First, the rule against surplusage provides that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (alteration in original; citation omitted). Yet the conduct-based approach gives no effect to the phrase "by its nature." *Supra* II.A.2. Constitutional avoidance does not permit the Court to toss aside "one of the most basic interpretive canons" and its obvious implications for this case. *Corley*, 556 U.S. at 314.

Second, when this Court interprets a statute, there is a "presumption of consistent usage." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). The conduct-based approach violates that presumption by treating identical language in Section 16 and Section 924(c) differently. This Court has previously refused to apply constitutional avoidance in similar circumstances because that "would render every statute a chameleon," as the same language could change meaning "depending on the presence or absence of constitutional concerns." *Clark*, 543 U.S. at 382; *see also id.* at 378 ("To give the[ ] same words a different meaning" is "to invent a statute rather than interpret one.").

Third, even if the Court were to deem both the always-a-risk approach and the conduct-based approach to be plausible, nonredundant, and consistent constructions, the rule of lenity would "demand resolution of [that] ambiguit[y] in [a] criminal statute[ ] in favor of the defendant." *Hughey v. United States*, 495 U.S. 411, 422 (1990); *see also*

United States v. Granderson, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity . . . ."). Whereas the conduct-specific approach expands the scope of Section 924(c) to potentially any crime involving the use or possession of a firearm, the always-a-risk approach cabins the statute to inherently dangerous offenses that lack force as an element. The rule of lenity requires this narrower scope.

Finally, the avoidance canon applies only "if a reasonable alternative interpretation poses no constitutional question[s]" of its own. *Gomez v. United States*, 490 U.S. 858, 864 (1989); *see also Dimaya*, 138 S. Ct. at 1217 (plurality op.) (refusing to apply avoidance canon because it "would merely ping-pong [the Court] from one constitutional issue to another"). As this Court has already recognized, however, a conduct-based approach "would generate its own constitutional questions." *Dimaya*, 138 S. Ct. at 1217 (plurality op.).

The government warns (at 52–53) of a flood of post-conviction petitions—but courts would face even more under the government's interpretation. For starters, the government's conduct-based approach creates a host of Sixth Amendment concerns in previously adjudicated cases, arising from courts' "'making findings of fact that properly belong to juries.'" *Dimaya*, 138 S. Ct. at 1217 (plurality op.) (quoting *Descamps*, 570 U.S. at 267). If the "crime of violence" determination were conduct-specific—*i.e.*, fact-dependent—it would become an element of the offense, which must be submitted to the jury. *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Here and in thousands of prior cases, though, the jury was *not*

asked to find that the defendant's underlying crime was a crime of violence under Section 924(c)(3)(B). Resp. Br. 50. And as the government acknowledges (at 53), each petition for relief under a conduct-based approach would require careful factual examination of the underlying record.

The conduct-based approach also raises grave due process concerns for wide swaths of past Section 924(c)(3)(B) defendants. If a "crime of violence" were to turn on specific factual findings, defendants who pleaded guilty to a Section 924(c)(3)(B) violation would have done so without "'real notice of the true nature of the charge,'" which is "'the first and most universally recognized requirement of due process.'" *Bousley v. United States*, 523 U.S. 614, 618 (1998) (citation omitted). If a defendant did not understand "the essential elements of the crime with which he was charged," his guilty plea would be "constitutionally invalid." *Id.* at 618–19. Similarly, previous indictments would not have "fairly inform[ed] [the] defendant of the charge against which he must defend." *Hamling v. United States*, 418 U.S. 87, 117 (1974). An indictment that failed to allege all elements of a crime—including the facts underlying the "crime of violence" determination—would fail to satisfy due process, *United States v. Carll*, 105 U.S. 611, 612–13 (1881), and would serve as another basis for post-conviction relief for numerous defendants.

The government's proposed conduct-based approach creates due process concerns for future defendants as well. Section 924(c)(3)(B) would not "give fair warning of the conduct which it prohibits" under the government's approach. *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). The same offense may constitute a "crime of violence" in some

circumstances, but not others. And virtually any felony could be found to involve a "substantial risk [of] physical force" if committed by an armed defendant. There is no fair warning when *any* offense—including bribery, selling bootleg DVDs, and counterfeiting currency—can be a crime of violence.

None of these constitutional problems arises with the always-a-risk approach. That interpretation would require courts to look only at the generic offense, consistent with the text, history, and purpose of the statute. No jury findings about a defendant's particular conduct would be necessary. The "crime of violence" determination would remain a legal question, causing no new concerns about past indictments or fair notice to future defendants. And because courts would have no need to search for an "idealized ordinary case," *Johnson* would not be controlling. 135 S. Ct. at 2557. An always-a-risk approach not only would maintain the status quo, but also could avoid most of the torrent of post-conviction petitions that the conduct-based approach would generate.

The government's conduct-based approach simply is not the answer to Section 924(c)'s constitutional questions. The only possible alternative is the always-a-risk approach.

III. Under The Always-a-Risk Approach, The Hobbs Act Conspiracy Convictions Must Be Vacated.

Under the always-a-risk approach, Hobbs Act conspiracy is not a "crime of violence" because it requires only a bare agreement to pursue a criminal objective. That much is clear from the government's routine prosecution of Hobbs Act conspiracies

involving fake stash-house robberies, which do not present any risk of physical force against others because the "others" involved are entirely fictional. *See, e.g.*, *United States v. Washington*, 869 F.3d 193, 196–97 (3d Cir. 2017). And because Hobbs Act conspiracy is not a crime of violence, Respondents' convictions were properly vacated.

A. Hobbs Act conspiracy requires proof of nothing more than an agreement to commit robbery that would affect commerce. And it is that offense, not the underlying target offense of robbery, that matters for purposes of the residual clause.

The Hobbs Act prohibits, as relevant here, not only committing "robbery or extortion," but also merely "conspir[ing] so to do." 18 U.S.C. § 1951. Unlike the general conspiracy statute, which requires that a conspirator "do any act to effect the object of the conspiracy," *id.* § 371, the Hobbs Act does not require an overt act in furtherance of the agreement. As this Court has explained, such congressional silence "speaks volumes" and demands application of the common-law definition of conspiracy, which "'does not make the doing of any act other than the act of conspiring a condition of liability.'" *United States v. Shabani*, 513 U.S. 10, 13–14 (1994) (drug conspiracy).

A mere agreement to commit robbery is thus itself sufficient to sustain a conviction for Hobbs Act conspiracy. *See Ocasio v. United States*, 578 U.S. — , 136 S. Ct. 1423, 1436 (2016) ("A defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he reached an agreement . . . to obtain . . . property under color of official right."). As the Seventh Circuit recently explained, "every other court of appeals to have directly addressed the question after *Shabani*" has agreed "that a Hobbs Act

conspiracy does not have an overt-act requirement." *United States v. Jett*, 908 F.3d 252, 265 (7th Cir. 2018); *see also United States v. Monserrate-Valentin*, 729 F.3d 31, 62 (1st Cir. 2013); *United States v. Clemente*, 22 F.3d 477, 480 (2d Cir. 1994); *United States v. Salahuddin*, 765 F.3d 329, 339–40 (3d Cir. 2014); *United States v. Pistone*, 177 F.3d 957, 960 (11th Cir. 1999).

Where conspiracy to commit Hobbs Act robbery is the crime of conviction, a court should look to whether *that* offense, as opposed to the target offense of robbery, always involves a substantial risk of physical force. By its terms, the residual clause asks whether the "offense"—meaning the crime of conviction—"by its nature, involves a substantial risk" of physical force. 18 U.S.C. § 924(c)(3)(B). Had Congress intended courts to delve into the target offense underlying the conspiracy, it easily could have added conspiracy to the elements clause—as it did for attempt crimes. *See id.* § 924(c)(3)(A) (defining as a "crime of violence" a felony offense that "has as an element the use, *attempted use*, or threatened use of physical force" (emphasis added)). Any ambiguity in this respect must, of course, be resolved in favor of lenity "to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

B. Because the offense of Hobbs Act conspiracy requires only an agreement to commit robbery, it does not always involve a substantial risk of physical force.

In fact, many Hobbs Act conspiracy cases cannot *possibly* involve a substantial risk of physical force against others. The federal government routinely prosecutes such conspiracies when it sets up reverse

sting operations involving fake stash-houses. These stings have "fast becom[e] a rather shopworn scenario" in lower courts. *United States v. Lewis*, 641 F.3d 773, 777 (7th Cir. 2011). The typical script involves the government "trawling for crooks in seedy, poverty-ridden areas—all without an iota of suspicion that any particular person has committed similar conduct in the past." *United States v. Hudson*, 3 F. Supp. 3d 772, 780 (C.D. Cal. 2014), *rev'd on other grounds sub nom. United States v. Dunlap*, 593 F. App'x 619 (9th Cir. 2014). After finding a mark, the government goes "to great lengths to construct" a plan for that individual to agree to intercept a drug delivery by a drug cartel at a stash house. *United States v. Clarke*, 649 F. App'x 837, 845 (11th Cir. 2016) (per curiam). "In reality, there [i]s no upcoming delivery, no stash house, and no cartel to rob." *United States v. Blitch*, 622 F.3d 658, 661 (7th Cir. 2010).

Precisely because these stings are completely made up, they "appear[ ] highly susceptible to abuse." *United States v. Hare*, 820 F.3d 93, 103–04 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 224 (2016). The government can "cast . . . bait in places defined only by economic and social conditions" and "create a criminal enterprise that would not have come into being but for the temptation of a big payday." *United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013). After recruiting candidates for the crime, the government exercises "virtually unfettered ability to inflate the amount of drugs supposedly in the house and thereby obtain a greater sentence for the defendant." *United States v. Briggs*, 623 F.3d 724, 729 (9th Cir. 2010). The defendant need only enter the agreement fabricated by the government to face liability and a sentencing enhancement.

But while fake stash-house stings create real harm for the defendants they ensnare, they involve no risk of physical force *against others* because the targets of the conspiracy—the witnesses or victims who might be harmed in a real robbery—do not exist. As one federal agent testified, the reverse sting operation is ultimately designed to be "a make-believe scenario [in] which a real victim or real witness *cannot* be hurt." Tr. of Trial Proceedings at 13, 124, *United States v. Jenkins*, No. 13-cr-20334-CMA (S.D. Fla. Feb. 4, 2014), ECF No. 137 (emphasis added).

Even conspiracy offenses that do require an overt act do not inherently involve a substantial risk of physical force against others. The general conspiracy statute, for example, requires merely an agreement and "*any* act to effect the object of the conspiracy." 18 U.S.C. § 371 (emphasis added). That act need not be unlawful, nor need it involve any risk of physical force against others. It could be as simple as purchasing supplies or undertaking other nonviolent preparatory actions.

As this case shows, the public interest is properly served under this approach. If a conspiracy matures beyond an unlawful agreement to an actual robbery (or just an attempted robbery), the defendants may be properly convicted under Section 924(c)(3)(A) for that robbery offense. In this case, for example, the court below affirmed Respondents' Section 924(c) convictions for Hobbs Act robbery because that offense—as opposed to an agreement beforehand—satisfies the elements clause. And if a conspiracy includes multiple robberies (or attempted robberies), the government may charge each robbery as a separate Section 924(c) offense if a firearm is involved in each. The government therefore retains its ability

to obtain sentencing enhancements for crimes that actually pose a substantial risk of physical force against others.

Because Hobbs Act conspiracy does not always involve a substantial risk of physical force against others, it is not a crime of violence under Section 924(c)(3)(B). Respondents' convictions under that provision were properly vacated.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 18-431

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL, founded in 1958, is the only nationwide professional bar association for public defenders and private criminal defense lawyers. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files numerous amicus briefs each year, in this Court and others, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a

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[1] Both parties consented to the filing of this *amicus curiae* brief in support of Respondents. No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity other than the *amicus* and its counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief.

fundamental interest in the equitable administration of the criminal justice system through clear laws that are properly applied in accordance with the Constitution, the will of Congress, and the decisions of this Court.

NACDL has a particular interest in this case because the government's proposed use of the canon of constitutional avoidance would undermine crucial and longstanding due process protections for criminal defendants.

SUMMARY OF ARGUMENT

The government argues that because this Court recently read 18 U.S.C. § 16(b) to require a categorical approach and to be unconstitutionally vague, this Court should read the materially *identical* words in 18 U.S.C. § 924(c)(3)(B) to mean something *different*. In support of this counterintuitive argument, the government relies on the canon of constitutional avoidance.

The use of constitutional avoidance that the government proposes is unprecedented, opportunistic, dangerous, and contrary to established principles of criminal law. The government has identified no case—and undersigned counsel is aware of none—in which this Court used constitutional avoidance to broaden rather than narrow a criminal statute. The government also has identified no case—and undersigned counsel is aware of none—in which this Court has used constitutional avoidance to avoid what the Court

already determined was the best reading of a materially identical statute.

The government's proposed use of constitutional avoidance would undermine the rule of law by encouraging arbitrary reinterpretations of vague language in criminal statutes. It also is irreconcilable with the well-established doctrines of fair notice and lenity, both of which safeguard the due process rights of criminal defendants and the separation of powers.

ARGUMENT

It is undisputed that "for many years," courts and the government have read section 924(c)'s residual clause to require the "categorical approach." Brief of the United States at 22. Just last Term, this Court confirmed that section 16(b)'s materially identical language is best read according to the categorical, ordinary case approach.[2] *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1217 (2018) (plurality opinion); *see also id.* at 1232 (Gorsuch, J., concurring in part and concurring in the judgment) (interpreting section 16(b) under the categorical, ordinary case

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[2] Apart from a comma after the word "that," sections 924(c)(3)(B) and 16(b) use identical language. *Compare* 18 U.S.C. § 924(c)(3) (a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), *with id.* § 16(b) (a felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

approach partly because the Court's "precedent seemingly requires this approach"); *id.* at 1235-36 (Roberts, C.J., dissenting) (acknowledging that section 16(b) calls for the categorical, ordinary case approach).

It also is undisputed that, read to call for the categorical, ordinary case approach, the language of section 924(c)'s residual clause is unconstitutionally vague. *See* Brief of the United States at 23, 45. The government now argues that the Court should reinterpret that language. The government's argument depends on using the canon of constitutional avoidance in an unprecedented and unconstitutional way.

The government argues that, *because* the established reading of the residual clause "renders the statute unconstitutionally vague," the Court should discard that reading. *Id.* at 23. In support of this interpretive about-face, the government argues that the constitutional avoidance canon "requires" the Court to construe the residual clause "to incorporate" a case-by-case approach. Brief of the United States at 44.

In fact, the constitutional avoidance canon does not justify, let alone require, reinterpreting section 924(c)'s residual clause to provide for a case-by-case approach. To the contrary, application of constitutional avoidance here would be unprecedented, create a dangerous precedent, and violate principles of fair notice and lenity.

I. THE GOVERNMENT'S PROPOSED USE OF CONSTITUTIONAL AVOIDANCE WOULD BE UNPRECEDENTED

The canon of constitutional avoidance "is a tool for choosing between competing *plausible* interpretations of a statutory text." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis added). It is "not a license for the judiciary to rewrite language enacted by the legislature." *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (citation omitted); *see also Jennings v. Rodriquez*, 138 S. Ct. 830, 836 (2018) ("a court relying on" the canon of constitutional avoidance "must *interpret* the statute, not rewrite it"). It is not plausible to interpret section 924(c)'s residual clause as calling for a case-by-case approach, for the reasons detailed in Respondents' Brief. For that reason alone, the government's reliance on constitutional avoidance fails.

Even if the residual clause were fairly susceptible to the government's now-preferred construction, however, application of the constitutional avoidance canon according to the government's argument here would be unprecedented.

A. This Court Never Has Used Constitutional Avoidance to Broaden a Criminal Statute

This Court never has used the canon of constitutional avoidance to interpret a criminal statute to apply *more broadly*. The government's proposed use of the canon here—under which a

defendant would be subject to criminal penalties that would not be applicable under the "avoided" interpretation of the statute—is unprecedented.

When this Court has "saved" criminal statutes by reference to the canon of constitutional avoidance, it has done so by *narrowing* the scope of liability. One way the Court has narrowed otherwise vague statutes is by limiting to a readily definable core the conduct for which a defendant might be liable.

For example, in *Skilling v. United States*, the Court considered whether a statute criminalized a range of conduct wider than the "core" conduct that Congress obviously intended to criminalize. 561 U.S. 358 (2010). The Court held that the statute criminalized *only* that core conduct because "[r]eading the statute to proscribe a wider range of offensive conduct . . . would raise" constitutional concerns. *Id.* at 408.[3] Similarly, in *United States v. X-Citement Video*, the Court added an element to the most grammatical reading of the statute, effectively narrowing its scope in order to avoid constitutional concerns. *See* 513 U.S. 64, 78 (1994). In short, the Court has not used constitutional avoidance to expand the range of conduct that constitutes a crime or qualifies for increased punishment.

The four constitutional avoidance cases the government cites (*see* Brief of the United States at

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[3] The *Skilling* Court noted that the Court had "par[ed] down" federal statutes to avoid constitutional problems. 561 U.S. at 409 n.43; *see also id.* at 406 n.40 (collecting cases).

45, 48, 49) only demonstrate the unprecedented nature of its proposal here. In *United States ex rel. Attorney General of U.S. v. Delaware & Hudson Co.*, the Court used the canon to *reject* the government's broad reading of the statute, under which liability had been found. 213 U.S. 366, 407 (1909).

Similarly, in *Jones v. United States*, the Court rejected the government's construction of the federal carjacking statute—which would have permitted a term of imprisonment of up to 25 years—because that construction would have raised serious constitutional questions. 526 U.S. 227, 229 (1999). The Court held that "the better reading," especially "in light of" principles of constitutional avoidance, was the reading offered by defendants, under which only a 15-year maximum sentence was available. *Id.*

In *INS v. St. Cyr*, rather than adopt the government's interpretation of federal statutes as restricting habeas claims, the Court used the constitutional avoidance canon to afford *more protection* to certain resident aliens seeking federal court review. 533 U.S. 289, 299-300 (2001). Because reading the relevant statutes to mean that Congress had stripped courts of certain habeas jurisdiction would have raised "substantial constitutional questions," the Court applied the canon to reach the opposite result. *Id.*

Finally, in the fourth case the government cites on constitutional avoidance, this Court rejected the application of the canon altogether. *Jennings v. Rodriquez*, 138 S. Ct. 830, 836 (2018). The *Jennings* Court explained that the court below, purporting to

apply the canon, had impermissibly rewritten the statutory text.

In sum, the government asks this Court to use the canon of constitutional avoidance to broaden a criminal statute, but has identified no case in which this Court has done so. As even the cases cited by the government demonstrate, using constitutional avoidance this way would be unprecedented.

B. The Government's Proposal Would Broaden the Application of the Section 924(c) Residual Clause

Despite lacking supporting precedent, the government asks the Court to reinterpret section 924(c)'s residual clause to encompass a *broader* scope of conduct than it otherwise would. The government's proposal "would expand the reach of Section 924(c)(3)(B) to a new class of offenders—namely those offenders who commit offenses that do not 'ordinar[ily]' pose a 'substantial risk' of application of physical force against another, but which pose such a risk under the specific factual circumstances of the offender's case." *United States v. Simms*, 914 F.3d 229, 255 (4th Cir. 2019) (en banc) (Wynn, J., concurring).

This expansion would have a serious broadening effect, as Respondents' Brief (at pp. 40-43) explains. Perhaps most notably, every case brought under the residual clause already involves a specific fact at least arguably likely to pose a substantial risk: the use of a gun. *See Simms*, 914 F.3d at 255 (Wynn, J., concurring).

As a practical matter, using "a firearm, standing alone, will always suffice to generate" a "substantial risk of physical force" in a case-by-case analysis "regardless of the nature of the underlying offense." *Id.* at 247 (majority opinion). No instruction could keep a jury from applying evidence on one element—using a gun—to its evaluations of the other—substantial risk of physical force.[4] As a result, the expansion of the residual clause that the government proposes would do more than subject additional defendants to mandatory minimum sentences—though that in itself would be unprecedented. Expanding the scope of the residual clause "would in effect judicially repeal" Congress's legislative decision to limit section 924(c) to crimes of violence. *Id.*

C. This Court Never Has Used Constitutional Avoidance to Interpret Identical Language in Related Statutes to Mean Different Things, As the Government Has Proposed Here

The government's position also is unprecedented in another way. The government asks this Court to read as requiring a case-by-case approach the same

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[4] Even if a jury were instructed not to collapse these two elements, and to consider them separately, this is a "context[] in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 (1968).

words that the *Dimaya* Court read to require a categorical approach. But the government has cited no case in which the Court used constitutional avoidance to construe language in one statute to mean something entirely different from what the identical language in a related statute means.

In fact, the Court consistently has rejected an approach to constitutional avoidance that "would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Clark*, 543 U.S. at 382. In *Clark*, the government argued—much as it does here—that "the statutory purpose and the constitutional concerns that influenced" the Court's earlier precedential construction of a statute were "not present" when the same language was applied to a different category of individuals, and so the Court should adopt a broader construction. *Id.* at 380. The Court forcefully rejected this "novel interpretive approach." *Id.* at 382. "To give the[] same words a different meaning" depending on the context in which they are applied, the Court observed, "would be to invent a statute rather than interpret one." *Id.* at 378.

Indeed, the Court has recognized that it should adhere to, not "reexamine," its "longstanding . . . construction" of statutory language. *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991); *see also Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is

appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

Neither the Courts of Appeals nor the government has identified any cases in which this Court used the canon of constitutional avoidance to avoid what it previously determined was the best interpretation of a materially identical statute. Rather, as the Fourth Circuit noted, this Court simply has not "done anything comparable" to what the government requests "in the name of constitutional avoidance." *Simms*, 914 F.3d at 252 (majority opinion).

II. THE GOVERNMENT'S PROPOSED USE OF CONSTITUTIONAL AVOIDANCE WOULD REDUCE THE CANON TO AN ARBITRARY TOOL WITH DANGEROUS RULE-OF-LAW IMPLICATIONS

Interpreting the same detailed language to mean different things in related statutes is unprecedented for a reason. The government's approach would have dangerous implications for the rule of law and would come at considerable cost to legal certainty.

The government's constitutional avoidance argument would turn "the rule against multiple interpretations" on its head, with the risk that "a statutory term . . . never [will] settl[e] on a fixed meaning." *In re Woolsey*, 696 F.3d 1266, 1277-78 (10th Cir. 2012) (Gorsuch, J.). That chameleonic approach to statutory interpretation, which this Court has rejected, *see Clark*, 543 U.S. at 382, "would leave citizens at sea, only and always

guessing at what the law might be held to mean in the unique 'fact situation' of the next case—a result in no little tension with the rule of law itself." *Woolsey*, 696 F.3d at 1277-78. In short, the government invites this Court to use constitutional avoidance to reject its own authoritative interpretation of materially identical statutory language and to revise the long-understood meaning of a statute "to meet the exigencies of each case coming before" the Court—but such an approach would "add only to the instability and uncertainty of the law." *Screws v. United States*, 325 U.S. 91, 113 (1945) (plurality opinion). If the Court were to revise the meaning of statutory language to avoid (rather than implement) previous decisions, what law applied in any given case would be deeply uncertain.

Indeed, beyond the specific language at issue here, the government's proposal would create broad uncertainty about the meaning of language in federal statutes. Whenever confronted with the same statutory language, even in related statutes, courts might presume—as the government asks this Court to rule here—not that Congress meant the same thing each time, but that each appearance of the language comes with a different meaning. And which statute means what could depend on which statute this Court happens to consider first.

This case illustrates the point. Sections 16(b) and 924(c) use materially identical language. The government concedes that, before *Dimaya*, there was no reason to read that language differently in one section than in the other—a necessary concession, since for decades the government has argued and

courts have decided (including in this very case) that it must be read the same way in both. *See* Brief for the United States at 22, 34. The government argues that, because section 16(b) has now been held unconstitutional, the interpretation of section 924(c) must change. But that logic, such as it is, applies equally well in reverse. If this Court first had held section 924(c)(3)(B) unconstitutional under the ordinary case approach, then according to the government's argument here, constitutional avoidance would "require" the Court to read section 16(b) to provide for a case-by-case approach in order to uphold it. In short, if the government's argument were accepted, then the result of *Davis* and *Dimaya* would be that, as between sections 924(c)(3)(B) and 16(b), one stands and the other falls based on the accident of timing. That is the epitome of arbitrary.

The government's proposed approach also would empower repeat litigants to engage in seriatim interpretations and re-interpretations of similarly worded statutes. A court's interpretation of a statute as unconstitutionally vague would make the meaning of similar statutes *less* certain, since the government could simply propose a new meaning in the next case—and if that were not held constitutional, still another meaning in the next. One repeat litigant that would particularly profit from this practice is the government. The practice would "sharply diminish Congress's incentive to draft a narrowly tailored law in the first place." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (citation omitted). Instead, the government's success here might encourage Congress to enact statutes

with ambiguous language, thereby allowing courts and the Executive to sort out their meaning through this game of constitutional-avoidance whack-a-mole.

The government does not and cannot offer any principled basis for an approach that would produce an outcome in which the constitutionality of similarly worded statutes depends on the order in which they are challenged. This Court should not tolerate that degree of arbitrariness in interpreting statutes. The government did not argue for—and this Court, in any event, rejected—the application of constitutional avoidance in both *Dimaya* and *Johnson*. *See Dimaya*, 138 S. Ct. at 1209-18 (plurality opinion); *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). The fact that the government now knows the Court views the categorical approach as unconstitutionally vague, and would like a different result, provides no sound reason to apply the constitutional avoidance canon in this case.

III. THE GOVERNMENT'S PROPOSED USE OF CONSTITUTIONAL AVOIDANCE IS IRRECONCILABLE WITH THE DUE-PROCESS RIGHT TO FAIR NOTICE

The right to fair notice, guaranteed by the Due Process Clause of the Fifth Amendment, is deeply rooted in American law. *See, e.g.*, *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[W]e insist that laws give the person of ordinary

intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 46 (D.C. Cir. 2016) (Kavanaugh, J.) (emphasizing "the bedrock due process principle that the people should have fair notice of what conduct is prohibited"), *reh'g en banc granted, order vacated* (Feb. 16, 2017), *relevant portion of opinion reinstated on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018). That right to fair notice includes being informed of "the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979).[5] Adopting the government's position in this case would do violence to that right.

The government's proposed case-by-case approach violates fair notice because the text of section 924(c)(3) gives clear notice that the residual clause in fact requires the categorical, ordinary case approach—as Respondents' Brief (at pp. 12-24) explains. Moreover, this Court's precedents confirm that similar language, and even materially identical language, establishes that approach. Just last year, this Court reiterated that materially identical language in 18 U.S.C. § 16(b) calls for the categorical, ordinary case approach. *See Dimaya*, 138 S. Ct. at 1209-16 (plurality opinion); *see also*

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[5] The injustice of using constitutional avoidance to construe criminal statutes against defendants without fair notice is further highlighted, in this case, by the harshness of the mandatory sentence enhancements under section 924(c). *See* 18 U.S.C. § 924(c)(1)(A).

Leocal v. Ashcroft, 543 U.S. 1, 7 (2004) (the text of section 16 "directs our focus to the 'offense' of conviction . . . . rather than to the particular facts"). Indeed, in *Dimaya*, a plurality of the Court determined that the case-specific approach is not even a *plausible* reading—let alone the best reading—of statutory language that is materially identical to section 924(c)(3). *See Dimaya*, 138 S. Ct. at 1217 (plurality opinion).[6]

This Court's precedent even before *Dimaya* compelled a categorical, ordinary case interpretation of the language in section 16(b), just as precedent compels that interpretation of the materially identical language here. In *Johnson v. United States*, this Court construed a similarly worded residual clause in the Armed Career Criminal Act—which imposed a sentence enhancement for a felony that "involves conduct that presents a serious

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[6] Justice Gorsuch concurred in the result, interpreting section 16(b) under the ordinary case approach partly because the Court's "precedent seemingly requires this approach." *Id.* at 1232 (Gorsuch, J., concurring in part and concurring in the judgment). Chief Justice Roberts likewise accepted that section 16(b) asks courts "to consider whether a particular offense, defined without regard to the facts of the conviction, poses a specified risk," and to look to "how those elements will ordinarily be fulfilled." *Id.* at 1235-36 (Roberts, C.J., dissenting). The Chief Justice argued in dissent, however, that section 16(b) "is not unconstitutionally vague even under the standard applicable to criminal laws." *Id.* at 1234. Notably, the Chief Justice also rejected a reinterpretation of the statute that "could have expanded the reach of the criminal provision—surely a job for Congress alone." *Id.* at 1240.

potential risk of physical injury to another"—to require a categorical, ordinary case approach. *See* 135 S. Ct. at 2563 (interpreting 18 U.S.C. § 924(e)(2)(B)). Congress knows how to instruct judges "to look into a felon's actual conduct"—"other statutes, in other contexts, speak in just that way." *Dimaya*, 138 S. Ct. at 1218 (plurality opinion) (citation omitted). Congress chose not to do so in section 924(c)'s residual clause, just as it chose not to do so in sections 16(b) and 924(e)(2)(B).

The government concedes that before *Dimaya*, both "lower courts and the government relied on this Court's decisions interpreting those other provisions to adopt a categorical approach to Section 924(c)(3)(B)." Brief for the United States at 34. Indeed, "the courts and the government have—with some difficulty—applied that approach for many years." *Id.* at 22. Moreover, "the government and the lower courts generally treated Section 924(c)(3)(B) analogously to similarly worded provisions in the ACCA's residual clause and Section 16(b)," the latter of which is "linguistically almost identical" to section 924(c)'s residual clause. *Id.* at 32, 39. Thus, the government itself not only interpreted the language at issue in *Dimaya* and *Johnson* to require the ordinary case approach, it also concededly construed the language at issue in *this* case to require that approach until just months ago. *See Dimaya*, 138 S. Ct. at 1217 (plurality opinion); *Johnson*, 135 S. Ct. at 2562; Pet. App. 4a. Yet it argues that section 924(c)'s residual clause should now be read differently, and the new reading applied against Respondents in this case, because

Dimaya both confirmed that the ordinary case approach applies to section 16(b) and held the statute unconstitutional under that approach.

The government's argument is plainly incompatible with any coherent concept of fair notice. As the government acknowledges, before *Dimaya* not only could a "person of ordinary intelligence" not have known that the case-specific approach applies, but also lower courts and the government itself had determined the opposite. *See* Brief for the United States at 34. If federal courts and the U.S. Department of Justice—with all their resources and extensive experience litigating and adjudicating section 924(c)(3)(B) cases—reasonably understood before *Dimaya* that the categorical, ordinary case approach applied, then *a fortiori* no ordinary citizen could have fair notice to the contrary.

Indeed, if the government's constitutional-avoidance argument were to prevail, consider what a "person of ordinary intelligence" would have to have known and understood in order to recognize that section 924(c) proscribes his conduct under a case-specific approach. Reading the statutory text, and even the judicial precedents interpreting that text, would not have helped, let alone sufficed. Rather, in order to recognize that section 924(c) covered his conduct, a citizen must have foreseen that the statutory language would be read to have one meaning in one context that would cause the materially identical language to be assigned a different meaning in his case.

The government's argument thus demands of ordinary citizens a level of predictive insight into the course of a statute's interpretation that is beyond the ken even of legal experts. But "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

What's more, the government turns fair notice inside out—reading the statutory text would only have led an ordinary citizen astray, since the very fact that the text of a materially identical statute is best read to adopt the categorical, ordinary-case approach (combined with a ruling that the statute is unconstitutional under that reading) becomes the predicate for reading that language differently in the next case. This Court has never before engaged in such a course of statutory interpretation, let alone required the public to engage in it *ex ante* to have the "fair notice" required by the Due Process Clause. Indeed, Justice Scalia once wrote that to charge the public "even with knowledge of Committee Reports" for fair-notice purposes "descends to needless farce." *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring) (citation omitted); *see also United States v. Hayes*, 555 U.S. 415, 437 (2009) (Roberts, C.J., dissenting) ("[A]n individual should not go to jail for failing to conduct a 50–state survey or comb through obscure legislative history."). The government's argument here—which would charge the public with knowledge of novel interpretations of statutory language based on application of

constitutional avoidance in the wake of intervening Supreme Court decisions interpreting that language in other statutes—descends even below farce, mocking the very concept of fair notice.

IV. THE GOVERNMENT'S PROPOSED USE OF CONSTITUTIONAL AVOIDANCE FUNDAMENTALLY IS AT ODDS WITH THE RULE OF LENITY

The government's argument that the Court should employ the constitutional avoidance doctrine to interpret section 924(c)'s residual clause in the government's favor also is inconsistent with the rule of lenity, which instructs that ambiguities in criminal statutes must be construed in the defendant's favor. This longstanding principle of construction safeguards the separation of powers as well as principles of fairness to defendants. For these additional reasons, the Court should reject the government's constitutional avoidance argument.

A. The Rule of Lenity Requires That Ambiguous Criminal Statutes Be Construed In the Defendant's Favor

The rule of lenity is a "venerable" principle of construction of criminal statutes which counsels strongly against the government's proffered construction of the section 924(c) residual clause. *R.L.C.*, 503 U.S. at 305 (plurality opinion); *see also* Intisar A. Rabb, *Appellate Rule of Lenity*, 131 Harv. L. Rev. F. 179, 181-82 (2018) (explaining that the rule "lies at the heart of interpretive questions in the criminal justice arena"). The rule is rooted in the

principle that criminal laws should be construed strictly. *See United States v. Wiltberger*, 18 U.S. 76, 95 (1820); *see also McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. Lawrence*, 3 U.S. 42 (1795) ("[W]henever a new remedy is so introduced, (more especially in a case so highly penal) it must be strictly pursued."); 1 W. Blackstone, Commentaries on the Laws of England 88 (1765) ("Penal statutes must be construed strictly."). Nearly two centuries ago, Chief Justice Marshall explained that "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *Wiltberger*, 18 U.S. 76, 95.

This Court repeatedly has recognized the longstanding principle requiring that courts resolve "ambiguity concerning the ambit of criminal statutes" in the defendant's favor. *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion) (citation omitted); *see, e.g., Skilling v. United States*, 561 U.S. at 410; *United States v. Santos*, 553 U.S. 507, 519 (2008) (plurality opinion) ("We interpret ambiguous criminal statutes in favor of defendants, not prosecutors."); *United States v. Bass*, 404 U.S. 336, 347 (1971).[7] The Court has

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[7] In some cases, the Court has stated that "a *grievous* ambiguity or uncertainty" in the statute is required to trigger the rule, *Ocasio v. United States*, 136 S. Ct. 1423, 1434 n.8 (2016) (emphasis added) (citation omitted), and that the rule applies only when there is no other "satisfactory construction" of the statute, *Lockhart v. United States*, 136 S. Ct. 958, 968 (2016). *But see Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003) (stating that "any ambiguity" triggers application of the *(cont'd)*

explained that when confronted with "two readings of what conduct Congress has made a crime, it is appropriate, before [the judiciary] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).[8]

The rule of lenity applies equally in the sentencing context. *See, e.g., Hughey v. United States*, 495 U.S. 411, 422 (1990) (discussing "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant," including a "federal statute that would enhance [the defendant's] penalty" (citation omitted)); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (stating that the rule "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose"); *R.L.C.*, 503 U.S. at 305 (plurality opinion) (noting that in the sentencing context, the rule

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rule). Here, to the extent the government argues that the statute is sufficiently ambiguous to trigger the application of constitutional avoidance, that purported ambiguity undoubtedly is "grievous" insofar as the government proposes to give the language of section 924(c)'s residual clause a construction different from the materially identical language in section 16(b).

[8] The Court has articulated similar standards for lenity in other cases as well. *See United States v. Granderson*, 511 U.S. 39, 54 (2004) (rule of lenity applies unless the government's statutory interpretation is "unambiguously correct").

requires "choos[ing] the construction yielding the shorter sentence").

B. Application of the Rule of Lenity Is Necessary to Uphold the Separation of Powers and Protect Principles of Fairness

The rule of lenity also serves critical functions by safeguarding the separation of powers and fairness principles. The invasion of Congress's legislative role is particularly troubling in a criminal case. A fundamental principle of American criminal law since the Founding is that "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. at 95; *see Dowling v. United States*, 473 U.S. 207, 213 (1985) ("Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate." (citation omitted)); *Liparota v. United States*, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity . . . strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."). As the Court has explained, "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83-84 (1955). Thus, the rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514.

Furthermore, the rule of lenity promotes fairness and uniformity in the criminal justice system by protecting the right to fair notice of what conduct is prohibited and minimizing the risk that prosecutors, when armed with an ambiguous criminal statute, will enforce it selectively or arbitrarily. *See United States v. Kozminski*, 487 U.S. 931, 952 (1988). By applying the rule of lenity, judges "provide an institutional check on the political excesses that permit unclear laws, prosecutorial overreach, and infringements on liberty." Rabb, 131 Harv. L. Rev. F. at 188.

C. The Government's Constitutional Avoidance Argument Fundamentally Is at Odds With the Rule of Lenity and the Principles of Fairness Underlying the Rule

The government's proposed use of constitutional avoidance is at odds with the rule of lenity and effectively would turn that doctrine on its head. "[T]he canon of constitutional avoidance has no application in the absence of statutory ambiguity." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494 (2001). Accordingly, that section 924(c)'s residual clause is ambiguous is a necessary premise of the government's constitutional avoidance argument. And if the statute is ambiguous, the rule of lenity weighs in favor of interpreting it in Respondents' favor. *See, e.g.*, *Wiltberger*, 18 U.S. 76; *Yates*, 135 S. Ct. at 1088; *Skilling*, 561 U.S. at 410; *Bass*, 404 U.S. at 347.

The government nevertheless urges the Court to construe *against* the defendant a purportedly ambiguous statute in order to save it by *broadening* its application. The Court should reject the government's gambit. As explained above, the Court has never used the doctrine of constitutional avoidance in this manner, and should not use it now to eviscerate the longstanding rule of lenity. *See Reynolds v. United States*, 565 U.S. 432, 442 (2012) (drawing upon principle that "the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered," in the face of the dissent's invocation of constitutional avoidance (citation omitted)); *Simms*, 914 F.3d at 257-58 (Wynn, J., concurring) ("[W]ere the judiciary to rely on constitutional avoidance to interpret a statute's breadth in a manner that extends beyond what the text 'clearly warrants'—as necessarily occurs when a court adopts a broad reading of an ambiguous statute—it would violate the due process principle of 'fair warning' undergirding the rule of lenity." (quoting *Hayes*, 555 U.S. at 436-37)). If courts faced with ambiguous criminal statutes begin to use constitutional avoidance to broaden them instead of using lenity to narrow them, then nothing remains of the venerable lenity doctrine.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 18-431

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MAURICE LAMONT DAVIS
AND ANDRE LEVON GLOVER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)'s residual clause is—like the identical residual clause in § 16(b)—unconstitutionally vague because it requires an ordinary-case categorical approach to identifying a "crime of violence."

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Association of Federal Defenders ("NAFD"), formed in 1995, is a nationwide, non-profit, volunteer organization whose members are attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD attorneys represent tens of thousands of individuals in federal court each year, including thousands charged with or convicted of violating 18 U.S.C. § 924(c). Amicus therefore has particular expertise and interest in the subject matter of this litigation. The issues presented are of great importance to our work and to the welfare of our clients.

SUMMARY OF ARGUMENT

This Court should strike § 924(c)'s residual clause as void for vagueness, and reject the government's proposal to adopt a new "circumstance-specific" approach. The government's efforts to minimize the constitutional and practical problems that would be created by adoption of the "circumstance-specific" approach are unpersuasive. And the government overstates the practical impact of striking § 924(c)'s residual clause as void for vagueness.

Respondents and many others who were actually convicted of § 924(c) offenses under the categorical

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1. The parties to the case have consented in writing to the filing of this brief. Sup. Ct. R. 37.3(a). No counsel for a party authored any part of this brief, and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

approach are entitled to relief regardless of whether the Court adopts the government's "circumstance-specific" approach. To uphold their convictions, or order them to be retried, under the "circumstance-specific" approach" would itself violate the Constitution. The government is wrong that if this Court were to adopt a "circumstance-specific" approach, the claims of defendants convicted under a statute that "was in fact constitutionally indeterminate" under a rule that it admits is retroactively applicable on collateral review, would simply disappear. Instead, if the Court were to adopt a different reading now, it could not be used to affirm, reinstate, or require retrial of cases in which defendants were convicted under the unconstitutional categorical approach. The remedy in such cases, as always, would be vacatur and resentencing on any remaining counts.

Further, the "circumstance-specific" approach would create significant constitutional problems of its own, whether applied prospectively or retrospectively. The canon of constitutional avoidance thus cannot support it. Moreover, the "circumstance-specific" approach would generate multiple new constitutional challenges, to be raised at trial, on direct appeal, and on collateral review.

Finally, the government grossly overstates the practical impact of striking § 924(c)'s residual clause as void for vagueness. The government is correct that striking down § 924(c)'s residual clause will preclude § 924(c) prosecutions that rely solely on underlying offenses that would qualify as crimes of violence only under the residual clause, but such is the consequence of an unconstitutional statute. In any event, most crimes the government considers violent will still count as crimes

of violence under § 924(c)(3)(A)'s force clause. And even if "immunized" from prosecution under § 924(c), these defendants can still be prosecuted under other federal statutes and still be sentenced to lengthy prison terms under those statutes.

In short, constitutional and practical considerations weigh decidedly against adoption of a "circumstance-specific" approach, and this Court should strike § 924(c)'s residual clause as unconstitutionally vague.

ARGUMENT

I. Defendants Convicted of § 924(c) Offenses Under a Categorical Approach Are Entitled to Relief Regardless of Whether the Court Adopts the Government's Novel, "Circumstance-Specific" Approach to § 924(c)(3)(B).

The government asks this Court to adopt a novel interpretation of § 924(c), one that no court had seriously considered until last year. Its reason for doing so is unfortunate. As the government concedes, § 924(c)'s residual clause is void for vagueness. Pet. Br. 45 ("It is now clear that construing Section 924(c)(3)(B) to incorporate an ordinary-case categorical approach would render it unconstitutional."); *see also Ovalles v. United States*, 905 F.3d 1231, 1239-40 (11th Cir. 2018) (en banc) ("[I]f we are required to apply the categorical approach in interpreting § 924(c)(3)'s residual clause—as the Supreme Court did in voiding the residual clauses before it in *Johnson* and *Dimaya*—then the provision is done for."). And if this Court strikes down § 924(c)(3)(B) as unconstitutionally vague, the government further concedes that relief would

be available to defendants on collateral review. Pet. Br. 52. To avoid these results, the government wants a new approach. The government's "circumstance-specific" approach, it says, would permit this Court to affirm convictions despite the statute's unconstitutionality. Pet. Br. 44-53. In other words, the government wants an end run around the Constitution.

This Court should reject the government's position. Resp. Br. 12-47. But even if this Court were to adopt the government's "circumstance-specific" approach moving forward, the fact remains that the respondents (and many other defendants) were convicted under § 924(c)'s unconstitutionally vague residual clause (under a categorical approach). That error cannot be papered over by finding harmless a different error that would be created by the new reading the government proposes. Pet. Br. 53. Indeed, to reinstate or affirm such convictions on a basis that was never charged or presented to a jury would itself violate the Constitution. Instead, any § 924(c) conviction premised on § 924(c)(3)(B)'s unconstitutionally vague residual clause must be vacated (with resentencing to follow on any remaining counts). *See, e.g.*, *United States* v. *Simms*, 914 F.3d 229, 250-51 (4th Cir. 2019) (en banc) ("[P]ast convictions employing the ordinary-case categorical approach will be called into question regardless of whether [this Court] invalidate[s] the statute or adopt[s] a new conduct-specific reading that all rejected before *Dimaya*.").

Remember, defendants convicted under a categorical approach did not have a right to a jury trial to determine whether § 924(c)(3)(B)'s residual clause was satisfied. As the facts of the instant cases illustrate, under the

categorical approach, the indictment charged, and the district court instructed the jury, that the underlying offense is a "crime of violence." *See* ROA 1152, 1298, 1361. The indictments did not allege that the defendants' conduct, "by its nature, involves a substantial risk that physical force against the person or property may be used in the course of committing the offense." Nor were the juries instructed on that definition or that they must determine whether the defendants' conduct satisfied it. Nor were defendants who pled guilty told that whether the underlying crime is a "crime of violence" was not a legal question already decided against them but an open question of fact they could dispute to a jury. This practical reality confirms that, if applied to defendants who have already been convicted under the unconstitutional categorical approach (including the respondents here), the government's "circumstance-specific" approach would violate the Fifth Amendment's Due Process and Indictment Clauses and the Sixth Amendment's right to a jury trial.

Start with the Due Process Clause. This Court has repeatedly held that to uphold a defendant's conviction based on a construction of a statute under which he was not convicted itself violates the Due Process Clause. "To conform to due process of law, [criminal defendants are] entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole v. Arkansas*, 333 U.S. 196, 202 (1948). In *Cole*, for instance, the state supreme court avoided defendants' constitutional challenge to the statute under which they were convicted by affirming "as though" they had been convicted of an offense "for which they were neither tried

nor convicted." *Id.* at 200-01. This Court reversed. "It is as much a violation of due process" for a reviewing court "to send an accused person to prison [for] a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id.* at 201.

Similarly, because due process requires that the defendant have notice of the specific charge against him and the ability to defend against that charge, an appellate court may not affirm a conviction—and thus avoid vacating *that* conviction—by altering the elements of the offense of which the defendant was convicted. *See Rabe v. Washington*, 405 U.S. 313, 315-16 (1972) (holding state supreme court violated due process by affirming defendant's conviction "under a statute with a meaning quite different from the one he was charged with violating"); *Eaton v. Tulsa*, 415 U.S. 697, 698-99 (1974) (per curiam) (holding state court of appeals "denied petitioner constitutional due process in sustaining" his conviction by treating it "as a conviction upon a charge not made" or found by the trier of fact); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (holding state supreme court violated due process by affirming convictions for disorderly conduct, for which there was no evidentiary support, on the ground defendants were convicted for refusing to obey a police officer, a charge that "was never made"); *Presnell v. Georgia*, 439 U.S. 14, 15-17 (1978) (per curiam) (holding state supreme court violated due process when it sustained a death sentence by piecing together parts of the record to make out the elements of a crime that was never charged or submitted to the jury, depriving defendant of notice and the ability to defend himself); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 155 (1969) (state supreme court's "remarkable job

of plastic surgery on the face of the ordinance" to reinstate defendant's conviction could not "restore constitutional validity to a conviction that occurred . . . under the ordinance as it was written"); *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966) ("[W]here an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act.").

Additionally, the respondents' conduct necessarily pre-dated the ruling the government seeks. Thus, the respondents (and other similarly-situated defendants) could not be retroactively subjected to a change in "the legal definition of the offense," the "kind of proof required to establish guilt," or the "questions that may be considered by the court and jury in determining guilt or innocence." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). If Congress were to enact such a law, applying it to pre-enactment conduct would violate the Ex Post Facto Clause, *id.*, and achieving the same result by judicial construction would violate the Due Process Clause. *See Marks v. United States*, 430 U.S. 188, 191-92 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964).

Likewise, a reviewing court cannot affirm, or reinstate, a past § 924(c) conviction obtained under the categorical approach by applying a different reading under which the defendant was not charged, tried, or convicted. "To uphold a conviction on a charge that was [not] presented to a jury at trial offends the most basic notions of due process," as "[f]ew constitutional principles

are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn v. United States*, 442 U.S. 100, 106 (1979). While a jury "might" have "reached the same verdict"—*if* it had been instructed to determine whether the defendant's conduct factually satisfied the definition of "crime of violence" *and* the parties had built their cases on that basis—"the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Id.* at 107.

This latter point bleeds into the Sixth Amendment's right to a jury trial. Even if a question of law at trial could be retroactively transformed into a question of fact for the jury on appeal, a reviewing court could not affirm the conviction "on legal and factual grounds that were never submitted to the jury." *McCormick v. United States*, 500 U.S. 257, 270 (1991). In addition to violating due process, doing so would violate the Sixth Amendment. "This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *Id.* at 270 n.8.

The Fifth Amendment's Indictment Clause would also preclude the retrial of a defendant under the government's "circumstance-specific" approach. Such a retrial would "destroy[] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone v. United States*, 361 U.S. 212,

217 (1960). "Deprivation of such a basic right is far too serious to be . . . dismissed as harmless error." *Id.*; *see also Russell*, 369 U.S. at 764, 770, 772 (reversing convictions outright where indictment "failed to sufficiently apprise the defendant of what he must be prepared to meet," for otherwise a defendant "could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him").

The constitutional error in the instant case (and ones like it) could not be deemed harmless. In the cases discussed above, this Court reversed outright, and the reasoning is entirely inconsistent with harmless error review. *See McCormick*, 500 U.S. at 270 n.8 ("Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury."); *Dunn*, 442 U.S. at 106 ("[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial."); *Shuttlesworth*, 394 U.S. at 155 (court's revision of ordinance on appeal did not "restore constitutional validity to a conviction that occurred . . . under the ordinance as it was written"). Here, the government claims, reviewing courts may affirm or reinstate convictions by finding harmless the purported omission of an "element" under its fact-based reading that did not exist when defendants were tried and convicted. Pet. Br. 53 (citing *Neder v. United States*, 527 U.S. 1 (1999)). Even if the error were omission of an element (it is not, Resp. Br. 50-51), harmless error review would be impermissible. Harmless error review applies under *Neder* only in a "narrow class of cases" where the defendant had the opportunity to contest the omitted element and failed to do so. *See Neder*, 527 U.S. at 15-16, 17 & n.2, 19.

In the end, if courts of appeals could find a constitutional error harmless by applying a new theory of guilt to facts they can glean from a record that was not developed on that basis, that reading would enable convictions to "rest on one point and the[ir] affirmance ... to rest on another," and would give the prosecution "free hand on appeal to fill in the gaps of proof by surmise or conjecture," leaving it "free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Russell v. United States*, 369 U.S. 749, 766, 768 (1962). And so, the government is wrong that if this Court were to adopt a "circumstance-specific" approach, the claims of defendants convicted under a statute that "was in fact constitutionally indeterminate" under a rule that it admits is retroactively applicable on collateral review, would simply disappear. Pet. Br. at 52-53. Instead, if the Court were to adopt a different reading now, it could not be used to affirm, reinstate, or require retrial of cases in which defendants were convicted under the unconstitutional categorical approach. The remedy in such cases, as always, would be vacatur and resentencing on any remaining counts.

II. The Government's "Circumstance-Specific" Approach Does Not Fix § 924(c)(3)(B)'s Vagueness Problems, And It Creates Other Problems As Well.

The government invokes the canon of constitutional avoidance in support of its "circumstance-specific" approach. Pet. 44-53. But this canon does not apply here. The canon applies only "if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). The government's "circumstance-specific" approach is not only unreasonable,

Resp. Br. 12-36, but it would also create significant constitutional problems of its own (whether applied prospectively or retrospectively). Indeed, adopting the government's "circumstance-specific" approach would generate multiple new constitutional challenges to be raised at trial, on direct appeal, and on collateral review. The government's attempt to minimize its practical impact, Pet. Br. 52-53, is thus unavailing.

A. Section 924(c)(3)(B) would still be unconstitutionally vague under the government's "circumstance-specific" approach.

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The "circumstance-specific" approach fails both prongs of this test.

1. The government's "circumstance-specific" approach would not give fair notice of what conduct § 924(c) prohibits. Bear in mind, the residual clause's actual language would not change. And that language, defining a crime of violence as an offence that "by its nature" poses a "substantial risk" of force against person or property, is simply not sufficiently definite to give ordinary people notice of what conduct the statute prohibits. *See United States v. Salas*, 889 F.3d 681, 686 (10th Cir. 2018) (holding § 924(c)(3)(B) would be unconstitutionally vague even if determined by a jury based on specific conduct). If this

Court could not figure out a plausible interpretation of this statutory language, a jury should not be expected to do so either. Whether one takes an "ordinary case" approach, or attempts to apply it to specific facts, the residual clause is simply too vague to "give fair warning of the conduct which it prohibits." *Bouie*, 378 U.S. at 350.

In practice, under the government's "circumstance-specific approach," § 924(c)(3)(B) would not have a "fixed," "settled and definite" meaning. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1226 n.1, 1227 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (citations omitted). Nor could it. The phrase "by its nature" is incomprehensible as applied to conduct-specific facts. *Simms*, 914 F.3d at 241 ("[E]ven under the Government's interpretation, giving 'by its nature' meaning would shift the § 924(c)(3)(B) inquiry away from conduct-specific facts and back towards a subjective consideration of that conduct's 'inherent features'—that is to say, another version of ordinary-case analysis."). Indeed, as shown by the jury instructions the government cites, judges are unable to explain to juries what the statute means. Resp. Br. 17. Three of the four instructions omit "by its nature," one replaces it with "as committed," another with "committed in a way," and another recites it but does not explain it. Resp. Add. 3a, 8a, 12a. One instruction even directs a verdict on two of five potential "crimes of violence," while also instructing the jury to make the determination with respect to all five. *Id.* at 16a-17a. When a law has not been defined in "understandable terms," and "the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced." *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966). As Justice Scalia observed regarding the Court's use of statistics to interpret the ACCA's residual clause:

> Vagueness, of course, must be measured ex ante—*before* the Court gives definitive meaning to a statutory provision, not *after*. Nothing is vague once the Court decrees precisely what it means. And is it seriously to be expected that the average citizen would be familiar with the sundry statistical studies showing . . . that this-or-that crime is more likely to lead to physical injury than what sundry statistical studies . . . show to be the case for burglary, arson, extortion, or use of explosives? To ask the question is to answer it.

Sykes v. United States, 564 U.S. 1, 32-33 (2011) (Scalia, J., dissenting), *overruled by Johnson v. United States*, 135 S. Ct. 2551 (2015). At least after *Sykes*, the average citizen was on notice that vehicular flight from a law enforcement officer was a "violent felony." Under the government's "circumstance-specific" approach, the provision would *never* have definitive meaning. With the definition converted from a legal determination to what the jury decides in one's own case, no one could predict in advance what crimes it covers.

The government is wrong that this is "exactly the type of fact-specific determination that juries are regularly called upon to make." Pet. Br. 15. Juries are called upon to decide historical facts, *viz.*, whether the defendant committed the elements of the underlying crime of violence, not the legal definition of the term "crime of violence." *See United States v. Gaudin*, 515 U.S. 506, 512-13 (1995) (explaining that the jury "[does] not [have the] power" to decide "*pure questions of law* in a criminal case," and instead "the judge must be permitted

to instruct the jury on the law and to insist that the jury follow his instructions"); *Hamling v. United States*, 418 U.S. 87, 118 (1974) (holding "definition of obscenity ... is not a question of fact, but one of law," which "does not change with each indictment" and is thus "sufficiently definite in legal meaning to give a defendant notice"). If juries defined crimes on a case-by-case basis, crimes would have no settled meaning, ever.

2. The government's "circumstance-specific" approach would also encourage arbitrary and discriminatory enforcement. Indeed, § 924(c) is already arbitrarily and discriminatorily enforced. Making it broader and more indefinite, and thus leaving it to prosecutors to determine its reach from case to case, would exacerbate the problem.

For one thing, § 924(c) is already applied in a racially disparate manner. In 2004, the Sentencing Commission reported that Black defendants were 48 percent of drug offenders with a weapon involved in their offenses, but 64 percent of those charged and convicted of a § 924(c) offense.[2] In 2011, the Commission reported that Black defendants were 44.9 percent of drug offenders with a weapon involved in their offenses, but 54.7 percent of those charged and convicted of a § 924(c) offense.[3]

For another, prosecutors have often misused § 924(c) as a threat to induce guilty pleas and then to

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2. U.S. Sent'g Comm'n, Fifteen Years of Guideline Sentencing at 90 (2004).

3. U.S. Sent'g Comm'n, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* at 282 (Oct. 2011) (hereinafter "2011 Mandatory Minimum Report").

punish defendants who exercise their right to trial. *See United States v. Looney*, 532 F.3d 392, 398 (5th Cir. 2008) ("[W]e must observe that the power to use § 924(c) offenses, with their mandatory minimum consecutive sentences, is a potent weapon in the hands of prosecutors . . . that can be abused to force guilty pleas under the threat of an astonishingly long sentence."); *United States v. Hungerford*, 465 F.3d 1113, 1121 (9th Cir. 2006) ("Hungerford received her 159–year sentence because she refused to enter into a plea agreement with the government. . . . [I]n light of her mental illness, Hungerford may not have even understood the nature of the offenses for which she was convicted. Yet, incredibly, the prosecutor believed that Hungerford received a fair sentence.") (Reinhardt, J., concurring in the judgment). As the data demonstrates, whether the prosecution charges any, one, or multiple § 924(c) counts depends to a great extent on whether a defendant pleads guilty or exercises her right to trial. Offenders with a weapon involved in their offenses in 2012 were 2.5 times more likely to receive a § 924(c) enhancement if they went to trial than if they pled guilty.[4] Defendants convicted of § 924(c) offenses in 2010 were 3.6 times more likely to be charged and convicted of multiple ("stacked") § 924(c) counts than if they pled guilty.[5]

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4. Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (Dec. 2013), https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead.

5. 2011 Mandatory Minimum Report, *supra* note 3, at 276 (4.8% of those who pled guilty and 17.4% of those went to trial were charged and convicted of multiple § 924(c) counts).

And this is very often unjust. For example, in *United States v. Holloway*, 68 F.Supp.3d 310 (E.D.N.Y. 2014), the government charged Holloway and an accomplice with three counts of carjacking and three § 924(c) counts for stealing three cars at gunpoint. Shortly before trial, the government offered to dismiss two of the § 924(c) counts, which would have required Holloway to spend about nine years in prison. He declined, went to trial, and was convicted. The judge imposed a sentence of 57 years and 7 months, consisting of 45 years under § 924(c)'s consecutive mandatory penalties and 151 months under the then-mandatory guidelines. Holloway's punishment for going to trial—his "trial penalty"—was 42 years in prison. His co-defendant, who pled guilty and testified against him, was sentenced to 27 months. *Id.* at 312-13. The judge stated, "the misuse of prosecutorial power over the past 25 years has resulted in a significant number of federal inmates who are serving grotesquely severe sentences." *Id.* at 316-17.

In *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006), the government initially charged Angelos for selling $350 worth of marijuana to an informant in three controlled buys, and one § 924(c) count for having a gun in his car on one of those occasions. The government coupled an offer of 15 years for a guilty plea with a threat to bring additional § 924(c) charges requiring over 100 years if Angelos went to trial. He declined the offer, and the government charged additional § 924(c) counts, setting the combined mandatory minimum sentence at 105 years. The jury acquitted him of three of the charges but convicted him of three others, and the judge was required to impose a sentence of 55 years. *Id.* at 1231-32. According

to the former U.S. Attorney for the District of Utah, "law enforcement officials allowed Angelos to commit multiple offenses, knowing that the 924(c) mandatory minimum sentences could be unreasonably stacked on top of each other by the prosecutor."[6]

In *United States v. Looney, supra*, Ms. Looney, age 53, was sentenced to 45 years for selling drugs with her husband and having guns in the house. The prosecutor offered 15 years for a guilty plea, but added two § 924(c) charges when she opted for trial. "Although thirty years of her sentence can be attributed to possessing guns in furtherance of her methamphetamine dealing, there is no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house." 532 F.3d at 396. Nonetheless, "the prosecutor exercised his discretion—rather poorly we think—to charge her with counts that would provide for what is, in effect, a life sentence." *Id.* at 398. Ms. Looney's co-defendant received a 37-month guideline sentence simply by being prosecuted in an adjoining district.

In *United States v. Rivera-Ruperto*, undercover FBI agents hired Rivera-Ruperto to provide armed security for six fictitious drug deals. The drugs were fake, the agents posed as buyers and sellers, and an agent instructed Rivera-Ruperto to bring a pistol each time. The government charged six attempted drug trafficking crimes and six § 924(c)s, then offered 12 years for a guilty

6. Testimony of Brett Tolman, Former U.S. Attorney for the District of Utah, to U.S. Sen. Comm. on the Judiciary, at 3-4 (Oct. 19, 2015), https://www.judiciary.senate.gov/imo/media/doc/10-19-15%20Tolman%20Testimony.pdf.

plea. Rivera-Ruperto declined, was found guilty, and was sentenced to 161 years. His trial penalty was 149 years, 130 years of which was for bringing a pistol to the fake transactions as instructed. *See United States v. Rivera-Ruperto*, 852 F.3d 1 (1st Cir. 2017), *reh'g denied*, 884 F.3d 25 (1st Cir. 2018) (en banc); *id.* at 25-48 (Barron, J., concurring in denial of petition for rehearing, and joined by all active judges in urging Supreme Court to revisit its Eighth Amendment jurisprudence), *cert. denied*, __S. Ct.__, No. 18-5384, 2019 WL 888158, at *1 (U.S. Feb. 25, 2019).

In limited circumstances (and prospectively only), courts can save a vague statute by adopting a "narrower or more definite" interpretation of that statute. *Bouie*, 378 U.S. at 353. The government's "circumstance-specific" approach, however, would make § 924(c) broader and less definite than the categorical approach. As respondents demonstrate, the "circumstance-specific" approach would allow prosecution and conviction for *any* crime when a gun was found, possessed, or carried. *See* Resp. Br. at 41-42. To convict, the government need only convince a jury that the presence of a gun made the crime risky. *See Simms*, 914 F.3d at 247 ("[T]he use, carrying, or possession of a firearm, standing alone, will always suffice to generate [the requisite] risk in a conduct-specific analysis, regardless of the nature of the underlying offense."). The government's "circumstance-specific" approach would thus delegate to prosecutors the authority to "shap[e] a vague statute's contours through their enforcement decisions." *Dimaya*, 138 S. Ct. at 1228 (Gorsuch, J., concurring in part and concurring in the judgment) (internal citation omitted). Such a result would violate "the requirement that a [criminal statute] establish minimal guidelines to govern

law enforcement." *Kolender*, 461 U.S. at 358 (internal citation omitted). "Where a criminal law fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* (internal citation omitted).

The government's "circumstance-specific" approach would allow prosecution for offenses that were not "crimes of violence" even under the categorical approach. Resp. Br. 40-43, 44. A person who sold counterfeit designer bags in violation of 18 U.S.C. § 2320 on five occasions with his legally-owned gun in his backpack could be charged with five § 924(c) offenses carrying five consecutive minimum sentences. A person who on six occasions submitted false expense reports to his federal employer in violation of 18 U.S.C. § 641, while on-duty with his government issued gun in his holster, could be charged with six § 924(c) offenses carrying six consecutive minimum sentences.

The government has argued elsewhere that juries could be instructed not to find a crime of violence based *solely* on the presence of a firearm. *Simms*, 914 F.3d at 247-48. "But this solution offers no affirmative principle to guide jury decision-making. How, exactly, are jurors to keep these two showings apart? Should they cross out facts involving the firearm? Imagine the firearm wasn't there? Pretend it was inoperable?" *Id.* at 248.

In short, although the possession, use, or carrying of a gun plays no role in the judge's determination of whether the underlying offense is a "crime of violence" under § 924(c)(3)(A) or (B), under the government's "circumstance-specific" approach, that fact would be

considered by the jury in determining whether the defendant's conduct "by its nature" involved a substantial risk of force.[7] The categorical approach maintains the distinction between the "two separate acts" that constitute an offense under § 924(c). *See Rosemond v. United States*, 572 U.S. 65, 75 (2014); *Smith v. United States*, 508 U.S. 223, 227–28 (1993). "Instead of condemning jurors to such an ill-defined inquiry, categorical analysis limits § 924(c)'s additional sanctions to the discrete and particularly serious classes of felonies selected by Congress—drug trafficking crimes and crimes of violence." *Simms*, 914 F.3d at 248.

B. To apply the "circumstance-specific" approach to pre-ruling conduct would violate fair notice and *ex post facto* principles.

The government has not only asked this Court to adopt a novel interpretation of § 924(c), but it has also asked this Court to apply that interpretation in cases (like the ones at issue here) where the lower courts applied the categorical approach, and asserts generally that it can be applied "retrospectively." Pet. Br. 53.

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7. Indeed, in each case in which a court of appeals has (improperly) conducted a circumstance-specific inquiry to find a defendant guilty on appeal, the court expressly relied on the gun even where it appears the defendant himself or herself did not use or hold the gun. *See United States v. Barrett*, 903 F.3d 166, 184 (2d Cir. 2018) (someone in conspiracy threatened victims at gunpoint); *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018) (accomplice fired gun during attempted carjacking); *United States v. Douglas*, 907 F.3d 1, 17 (1st Cir. 2018) ("one or more conspirators" brandished firearms).

To punish a defendant for pre-ruling conduct that would not have violated § 924(c) at the time it was committed would violate the due process requirement that a criminal statute give "fair warning of the conduct which it prohibits," as well as *ex post facto* principles. *See Bouie*, 378 U.S. at 350, 353-54. It follows that to prosecute or retry a defendant for pre-ruling conduct under the circumstance-specific approach would violate the fair warning requirement and *ex post facto* principles as well. In *Marks*, 430 U.S. 188, for instance, the defendants were convicted under a statute that had always used "sweeping language." *Id.* at 196. This Court first severely restricted the statute's reach in *Memoirs v. Massachusetts*, 388 U.S. 413 (1966), then relaxed those restrictions in *Miller v. California*, 413 U.S. 15 (1973). *Memoirs* was the law at the time of the defendants' conduct, *id.* at 194, but the defendants were convicted over their objection on an instruction under the *Miller* test. *Id.* at 189-91. This Court reversed, holding, "in accordance with *Bouie*, that the Due Process Clause precludes the application to petitioners of the standards announced in *Miller*[], to the extent that those standards may impose criminal liability for conduct not punishable under *Memoirs*." *Id.* at 196. Thus, the court of appeals' application of harmless error review to conclude that defendants' conduct satisfied either test was "not an adequate substitute" for a determination of guilt under *Memoirs*, and they were also entitled to application of "any constitutional principle enunciated in *Miller* which would serve to benefit" them. *Id.* at 196-97 & n.12 (internal citation omitted).

C. The government's attempt to minimize the impact if this Court were to adopt a "circumstance-specific" approach is unavailing.

The government asserts that if this Court were to adopt its "circumstance-specific" approach, it could be applied through harmless error review or retrial, and that the only "prisoners who might be eligible for collateral relief would be those who could show actual innocence under the statute as so construed." Pet. Br. 53, 55.

As explained in Part I, respondents and many others were convicted under § 924(c)'s unconstitutionally vague residual clause, and that error cannot be deemed harmless. The question in their cases, answered by judges, was whether the "ordinary case" of the underlying crime satisfied the legal definition in § 924(c)(3)(B) as a matter of law. *See* ROA 1361 ("I instruct you that the crimes alleged in Counts One and Six are crimes of violence.").[8] No jury was asked the entirely different question whether the facts of the case somehow fit § 924(c)(3)(B), which makes harmless error review entirely inapplicable.[9] *See Neder*,

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8. *See also Brown v. United States*, 906 F.3d 159, 160–61 (1st Cir. 2018) ("At Brown's trial in 2009, the jury was instructed that the conspiracy counts were 'crimes of violence.'"); Trial Transcript at 197, *United States v. Barrett*, No. 1:12-cr-00045 (S.D.N.Y. Mar. 18, 2013) (ECF No. 183) ("I instruct you that the [robbery conspiracy and robberies alleged in Counts One, Three and Five] of the indictment qualify under the law as crimes of violence."); Trial Transcript at 123, *United States v. Salas*, No. 12-3183 (D.N.M. Mar. 1, 2015) (ECF No. 369) ("You are instructed that arson is a crime of violence.").

9. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (Because "there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of [harmless-error] review is simply

527 U.S. at 17 n.2 (reaffirming that a directed verdict is not subject to harmless error); *Rose v. Clark*, 478 U.S. 570, 578 (1986) ("[T]he error in such a case is that the wrong entity judged the defendant guilty."). Nor can they be retried, at the government's instance, on a charge not presented in the indictment the grand jury returned against them. *See Stirone*, 361 U.S. at 217.

And if this Court holds that § 924(c)'s residual clause is a factual element for the jury, many prisoners, because they are serving such long sentences, will seek collateral review based on new claims created by the new construction itself.[10] For example, if § 924(c)(3)(B) is an element, prisoners would have cognizable claims that their indictments did not contain all of the elements of the offense or fairly inform them of the charge against which they had to defend, in violation of the Fifth Amendment's Due Process and Indictment Clauses. *See Hamling v. United States*, 418 U.S. 87, 117 (1974); *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) ("An indictment must set forth each element of the crime that it charges."). This error may not be subject to harmless error review. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 117-18 (2007) (Scalia. J., dissenting) (noting Court had not decided whether a constitutionally deficient indictment was amenable to harmless error, but would find the error to be structural) (citing *United States v. Gonzalez–*

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absent.... There is no *object*, so to speak, upon which harmless-error scrutiny can operate.... The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action.").

10. If this Court were to accept the government's invitation to adopt a "circumstance-specific" approach, it would be a "new" rule, and would apply retroactively on collateral review. *See Schriro v. Summerlin*, 542 U.S. 348, 354 (2004).

Lopez, 548 U.S. 140 (2006); *Neder*, 527 U.S. at 30 (Scalia, J., concurring in part and dissenting in part)).

Likewise, if § 924(c)(3)(B) is an element, the judge almost certainly directed a verdict on that element in violation of the Sixth Amendment. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572–573 (1977); *Carpenters v. United States*, 330 U.S. 395, 408 (1947). That error can never be harmless. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) ("[D]irected verdicts for the State [are not] sustainable on appeal."); *Rose*, 478 U.S. at 578 (government cannot contend that a directed verdict was harmless regardless of evidence of guilt).

The government at least recognizes that prisoners who pled guilty would have cognizable claims that their pleas were not knowing and intelligent. Pet. Br. 53 (claiming that "the only prisoners who might be eligible for collateral relief would be those who could show actual innocence under the statute as so construed") (citing *Bousley v. United States*, 523 U.S. 614 (1998)). The Court has long held that "a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousley*, 523 U.S. at 618 (citations omitted). But the government is wrong that these prisoners would be eligible for relief only if they "could show actual innocence under the statute as so construed." Pet. Br. 53. While that is one way to overcome procedural default, a petitioner may also show cause and prejudice. Cause is established when, as here, a claim was "so novel that its legal basis [was] not reasonably available." *Bousley*, 523 U.S. at 622. Prejudice is shown by a reasonable probability that the

defendant would not have pled guilty had he been properly advised. *See Strickler v. Greene*, 527 U.S. 263, 289-90 (1999).

III. The Government Grossly Overstates the Practical Implications of Striking § 924(c)'s Residual Clause as Void for Vagueness.

The government claims that striking § 924(c)'s residual clause as void for vagueness "would inappropriately undermine Congress's law-enforcement efforts, with severe practical consequences." Pet. Br. 49. Doing so, the government claims, would "effectively immuniz[e] from Section 924(c) prosecution" "some of the most violent criminals on the federal docket." Pet. Br. 49. In support, the government cites the facts of this case and seven others. Br. 49-52 (citing *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) (en banc); *United States v. Eshetu*, 898 F.3d 36 (D.C. Cir. 2018); *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018); *United States v. Jenkins*, 849 F.3d 390 (7th Cir. 2017), *vacated*, 138 S.Ct. 1980 (2018); *Knight v. United States*, No. 17-6370 (6th Cir.); *Eizember v. United States*, No. 17-1406 (8th Cir.); *United States v. Cruz-Ramirez*, No. 11-10632 (9th Cir.)).

The government is correct that striking down § 924(c)'s residual clause will preclude § 924(c) prosecutions that rely solely on underlying offenses that would qualify as crimes of violence only under the residual clause. But such is the consequence of an unconstitutional statute. *Marbury v. Madison*, 5 U.S. 137, 178 (1803). "If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they

both apply." *Id.* When this Court "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent,'" it necessarily "immunized" individuals from prosecution under those statutes. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010). If there was something impermissible or unjustified with "immunizing" individuals from the reach of an unconstitutionally vague residual clause, then this Court would have decided *Johnson v. United States*, 135 S.Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), differently.

In any event, the government's concerns are overblown in two important respects. First, most crimes the government considers violent will still count as crimes of violence under § 924(c)(3)(A)'s force clause. And second, even if "immunized" from prosecution under § 924(c), these worst-of-the-worst defendants (in the government's view) can still be prosecuted under other federal statutes (and still be sentenced to comparatively lengthy sentences under those statutes).

Start with this case. The lower courts have held that robbery qualifies under the force clause. *United States v. Jefferson*, 911 F.3d 1290, 1296 n.4 (10th Cir. 2018) (collecting cases). For this reason, there is no concern of "immunization" from prosecution under § 924(c), as the respondents were convicted of a § 924(c) offense predicated on a completed robbery. Pet. Br. 8. With at least one other viable § 924(c) count to charge in this case, the government cannot seriously suggest that it suffered "severe consequences" because it could not also charge another § 924(c) count based on the respondents' conspiracy to commit the robberies.

Additionally, aside from the § 924(c) counts, respondents were charged with three robberies under 18 U.S.C. § 1951(a) and the conspiracy to commit robbery (also under § 1951(a)). Pet. Br. 6. The statutory maximum on each of the § 1951 counts was twenty years (for a total of 80 years). 18 U.S.C. 1951(a). The respondents were also convicted of a robbery-premised § 924(c) count, which carried a mandatory minimum of ten years' imprisonment and a statutory maximum of life. 18 U.S.C. § 924(c)(1)(A)(ii). In light of these already-harsh penalties, there are no "severe practical consequences" to vacating the conspiracy-premised § 924(c) count in this case.

The facts in *Simms* are similar to this case. 914 F.3d at 232. The defendants there committed an armed robbery of a McDonald's restaurant (Simms himself crawled through the drive-through window, pointed a gun at the manager, and demanded money). *Id.* It is unclear why the government charged a conspiracy, rather than a substantive robbery offense, but it is clear that, based on Mr. Simms's conduct, he was not "immune" from a § 924(c) prosecution. To the extent that the defendant in *Simms* is now "immune" from § 924(c) prosecution, it is solely because of the government's own charging decision. *Abuelhawa v. United States*, 556 U.S. 816, 823 n.3 (2009) ("prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes"). And the total 199-month sentence imposed for the conspiracy and § 924(c) conviction still falls below the 20-year statutory maximum applicable to the latter offense. 18 U.S.C. § 1951(a). Again, the government's "severe consequences" rationale is fiction, not fact.

Eshetu also involved a conspiracy to commit armed robbery. *Eshetu*, 898 F.3d at 36. Unlike this case and

Simms, however, *Eshetu* involved a government-plotted scheme to rob a liquor store. *United States v. Eshetu*, 863 F.3d 946, 949-950 (D.C. Cir. 2017), *vacated in part*, 898 F.3d 36 (D.C. Cir. 2018). Because the defendants conspired with a confidential informant and an undercover officer, they were arrested before any robbery occurred. *Id.* at 950. But the defendants were still convicted of the underlying § 1951 robbery conspiracy. *Id.* at 951. And while two defendants were also convicted of a § 924 count (Lovo and Sorto), their sentences did not come close to exceeding the twenty-year statutory maximum for the § 1951 robbery conspiracy (Lovo received a 104-month term of imprisonment, *United States v. Lovo*, 263 F.Supp.3d 47, 48 (D. D.C. 2017), and Sorto received a 100-month term of imprisonment, *United States v. Sorto*, Case No. 1:13-cr-00262-RMC-2, D.E.241 (D. D.C. Apr. 20, 2015)). The district court could impose the identical sentences absent the since-vacated § 924(c) count. USSG § 2B3.1(a)(2) (increasing a robbery defendant's base offense level if a firearm was discharged, used, or possessed); 18 U.S.C. § 3553(a)(1) (requiring district courts to consider "the nature and circumstances of the offense" when imposing sentence).

The government's citation to such a sting operation in support of its "severe consequences" rationale is questionable for other reasons. Such prosecutions have been labeled "'tawdry' because the tired sting operation seems to be directed at unsophisticated, and perhaps desperate, defendants who easily snap at the bait put out for them." *United States v. Lewis*, 641 F.3d 773, 777 (7th Cir. 2011). Still others have labeled such stings "a disreputable tactic." *United States v. Kindle*, 698 F.3d 401, 414 (7th Cir. 2012) (Posner, J., concurring and dissenting),

majority decision vacated, *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014). "Law enforcement use them . . . to jack up [defendants'] sentences." *Id.* at 414. There is also "no legitimate dispute that these stings primarily affect people of color." *United States v. Sellers*, 906 F.3d 848, 857 (9th Cir. 2018) (Nguyen, J., concurring). For these reasons, some have called for an end to the practice (to "relegate" the practice "to the dark corridors of our past"). *United States v. Brown*, 299 F.Supp.3d 976, 983-984 (N.D. Ill. 2018). Even if the government can "invent fake crimes and imprison people for long periods of time for agreeing to participate in them," *Sellers*, 906 F.3d at 856, eliminating § 924(c) prosecutions from this practice is not a "severe consequence" that should concern this Court.

Salas involved "various arson-related convictions." 889 F.3d at 683. Aside from the since-vacated § 924(c) conviction, the defendant in *Salas* (who used a "Molotov cocktail to firebomb a tattoo parlor") was convicted of three additional counts: (1) conspiracy to commit arson, 18 U.S.C. § 844(n); (2) aiding and abetting the arson, 18 U.S.C. § 844(i); and (3) possession of an explosive by a convicted felon, 18 U.S.C. § 842(i). *Id.* He received a 35-year sentence. *Id.* The statutory maximum sentence for each of the arson offenses was twenty years. 18 U.S.C. § 844(i), (n). The statutory maximum sentence for the felon-in-possession conviction was ten years. 18 U.S.C. § 844(a)(1). The 35-year sentence fits comfortably within the 50-year combined statutory maximum for the other three convictions, and it is possible that the district court will impose the same sentence on remand (the district court has not resentenced the defendant because of the government's pending petition for a writ of certiorari in this Court).

Jenkins involved an armed kidnapping under 18 U.S.C. § 1201(a). 849 F.3d at 391. The statutory maximum for kidnapping is life in prison. 18 U.S.C. § 1201(a). Mr. Jenkins received a 308-month term of imprisonment for the kidnapping and § 924(c) convictions. 849 F.3d at 391-92. The district court could impose that identical sentence on just the kidnapping count. 18 U.S.C. § 1201(a). Indeed, without the § 924(c) conviction, the defendant's offense level under the guidelines would increase by two levels (from 34 to 36 in this case). U.S.S.G. § 2A4.1(a)(3). There is no reason to think that the absence of a § 924(c) conviction will result in an unjustifiably low sentence in that case.

The defendant in *Knight* was convicted of ten counts, three of which involved § 924(c). *Knight v. United States*, 2017 WL 4018848, at *3 (E.D. Tenn. Sept. 12, 2017). One of the three § 924(c) counts was premised on a carjacking under 18 U.S.C. § 2119. *Id.* Mr. Knight has not challenged this conviction on appeal, *Knight v. United States*, No. 17-6370, Appellant's Br. 33 (6th Cir. Oct. 1, 2018), likely because the lower courts have held that carjacking qualifies as a crime of violence under the force clause, *United States v. Jackson*, __ F.3d __, 2019 WL 1122274, at *11 (6th Cir. Mar. 12, 2019) (collecting cases). Thus, it is factually incorrect to state that the defendant in *Knight* is "immune" from prosecution under § 924(c). And Mr. Knight faced up to life in prison on the carjacking § 924(c) conviction and a kidnapping conviction under § 1201(a) (not to mention lengthy statutory maximums on the other counts of conviction). Again, the district court could impose the identical sentence even absent the other two § 924(c) counts. The government's "severe consequences" do not exist.

The defendant in *Eizember* was convicted of two counts of kidnapping, one count of carjacking, and one § 924(c) count. *United States v. Eizember*, 485 F.3d 400, 402 (8th Cir. 2007). While the indictment tied the § 924(c) count to the kidnapping counts and not the carjacking count, the underlying facts indicate that the defendant used the gun to commit the kidnapping and the carjacking. *Eizember v. Trammell*, 803 F.3d 1129, 1134 (10th Cir. 2015). Section 924(c) was thus a viable charge in this case. *Jackson*, __ F.3d __, 2019 WL 1122274, at *11. And again, even without it, the defendant in *Eizember* faced a statutory maximum of life on both of the kidnapping counts. 18 U.S.C. § 1201(a). Mr. Eizember is also on death row in Oklahoma. *Eizember*, 803 F.3d at 1133-1134. In practice, the § 924(c) conviction is irrelevant. The government's "severe consequences" rationale is entirely absent.

Cruz-Ramirez involves a complex seven-defendant prosecution for multiple crimes committed by MS-13 gang members. *United States v. Cruz-Ramirez*, No. 11-10632, Gov't Br. 5-8 (9th Cir. Nov. 17, 2017). One defendant (Cruz-Ramirez) has challenged one of his § 924(c) convictions on appeal because that conviction is premised on a conspiracy conviction. *Id.* at 346. But this defendant was also convicted of a second § 924(c) count, with the underlying crime of violence of murder in aid of racketeering, 18 U.S.C. § 1959(a)(1), which has not been challenged on appeal. *Id.* at 6. Thus, this defendant was not "immune" from prosecution under § 924(c). And this defendant also received sentences of life imprisonment on three separate counts. *Cruz-Ramirez*, No. 11-10632, Gov't Br. 7. If the additional § 924(c) count is vacated, no "severe consequences" will result.

Federal prosecutors on the ground understand the point. Consider *United States v. Gabourel*, No. 2:10-cr-00923-SJO-30 (C.D. Cal.). There, the district court vacated a § 924(c) conviction predicated on two conspiracy counts. *Id.*, D.E.3145 (C.D. Cal. July 16, 2018). In its resentencing memorandum, the government asked the district court to impose the identical 40-year sentence previously imposed in the case. *Id.*, D.E.3231 at 5 (C.D. Cal. Mar. 1, 2019). According to the government, mere "technical changes to the case law's definition of a 'crime of violence'" required vacating the § 924(c) count. *Id.* at 4. The defendant "remain[ed] convicted of the two most significant offenses that drove the Court's original sentencing findings" (RICO conspiracy and conspiracy to commit murder). *Id.* The government noted that, even after vacatur of the § 924(c) count, the defendant still had an advisory guideline range of life. *Id.* at 5. In other words, rather than rail that the district court's vacatur of the § 924(c) count resulted in "severe consequences," the government explained that the vacatur was inconsequential. The district court concurred and imposed the identical 40-year sentence. *United States v. Gabourel*, No. 2:10-cr-00923-SJO-30, D.E.3242 (C.D. Cal. Mar. 4, 2019).

One last point. The government expresses concern for "Congress's law-enforcement efforts." Pet. Br. 49. But Congress makes laws; it does not enforce them. *Patchak v. Zinke*, 138 S. Ct. 897, 904 (2018). It is the executive branch that enforces the law. *Id.* "By vesting each branch with an exclusive form of power, the Framers kept those powers separate." *Id.* "Each branch exercises the powers appropriate to its own department, and no branch can encroach upon the powers confided to the others." *Id.* at 904-905 (cleaned up). "By separating the lawmaking and

law enforcement functions," *United States v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015) (Gorsuch, J., dissenting), reversed, 136 S.Ct. 1113 (2016), the Constitution makes clear that there is no such thing as "Congress's law-enforcement efforts." And here, as the above cases illustrate, the *government's* law-enforcement efforts will continue unimpeded after this Court strikes down § 924(c)(3)(B)'s residual clause as void for vagueness.

CONCLUSION

This Court should strike § 924(c)'s residual clause as void for vagueness, reject the government's proposal to adopt a "circumstance-specific" approach, and affirm the judgment of the Fifth Circuit. For the reasons stated above, even if the Court adopts a construction of § 924(c)(3)(B) different from that under which respondents were convicted, the Court should affirm the Fifth Circuit's judgment and remand with instructions that respondents' convictions not be reinstated and that they be resentenced.

Respectfully submitted,

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